

No. 10077

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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OMAHA WOODMEN LIFE INSURANCE SO-  
CIETY, a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, as trustee of an ex-  
press trust,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the District of Idaho,  
Eastern Division.

FILED

APR 8 - 1942

PAUL P. O'BRIEN,

CLERK









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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of The Fifth Judicial District  
Of the State of Idaho, in and for the County  
Of Bannock.

No. 1140

HARRY E. KRUSSMAN, as trustee of an  
express trust, Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE  
SOCIETY, a corporation, Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action  
against the defendant complains and alleges as fol-  
lows, to-wit:

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\*Page numbering appearing at foot of page of original certified  
Transcript of Record.

## I.

That the defendant now is and ever since September 29, 1935, and for some time prior thereto has been a Fraternal Beneficiary Association incorporated under and by virtue of the laws of the State of Nebraska and qualified to do business in the State of Idaho as a foreign corporation, doing business of insuring the lives of its members, and that ever since the time first aforesaid until about the 4th day of August, 1937, the said defendant was doing business under the corporate name of Pacific Woodmen Life Association, and that on or about said last mentioned date the articles of incorporation of said defendant were amended changing its corporate name from Pacific Woodmen Life Association to Omaha Woodmen Life Insurance Society, and that ever since about the 4th day of August, 1937, the said defendant has been doing business under the corporate name of said Omaha Woodmen Life Insurance Society.

## II.

That on the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof while it was doing business under the corporate name of Pacific Woodmen Life Association under a ten year term insurance [2] certificate hereinafter set out and remained such member in good standing and entitled to all the privileges and benefits appurtant to said membership until his death which occurred on August 3, 1940.

III.

That at the time the said Eric A. Krussman was so received as a member of said defendant corporation, the said defendant, then doing business under the corporate name of Pacific Woodmen Life Association, duly executed and delivered to him a certain written and printed certificate bearing date the 30th day of September, 1935, copy of which certificate is as follows:

Camp No. 7—Idaho Age 54  
Certificate No. TE-1321001  
Certificate amount, \$5,000.00

RATES:

Monthly .....	\$ 11.70
Quarterly .....	34.85
Semi-Annually .....	69.00
Annually .....	135.25

PACIFIC WOODMEN LIFE ASSOCIATION:

Ten-Year Term Insurance Certificate

Pacific Woodmen Life Association, a fraternal beneficiary association incorporated under the laws of the State of Nebraska, and referred to herein as the Association, for and in consideration of the warranties contained in the application of Eric A. Krussman for membership in the Association, and in further consideration of the payment to the Association of the sum of \$..... for the remainder of the month in which this certificate is dated by the Secre-

tary of the Association, and the payment to it of \$11.70 on or before the last day of each month thereafter, and for the remainder of the certificate year in which death occurs, issues this certificate of membership to him, as member and agrees that:

The Association will pay upon satisfactory proof of the death of the member, while in good standing, the sum of Five Thousand Dollars (\$5,000.00), to Sagred Marie Krussman, the beneficiary or beneficiaries herein, related to the member as Wife.

This Certificate shall cease and all benefits thereunder terminate and be of no effect from and after the tenth anniversary of the date of this certificate as dated by the officers of the Association, provided that the member may at any time within eight years from the date hereof and prior to attaining the age of sixty years surrender this certificate and receive in exchange therefor a certificate providing for term insurance for a period of ten years from the date of such exchange. The member will be required to pay the rate of the new certificate as fixed for his then attained age.

Or, the member may within eight years from date hereof and prior to attaining the age of sixty years exchange this certificate for any form of certificate issued by the Association, and the member shall pay the rate as fixed for such certificate received in exchange as is



charged for one of his then attained age. [3] No medical examination shall be required to effect such change, except in the event the certificate selected shall provide for additional disability, double indemnity, or other benefits not contemplated or provided for in this certificate.

This Certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The articles of incorporation and the Constitution, Laws and By-Laws of the Association, and all amendments to each thereof which may be made hereafter; the application for membership, signed by the applicant and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the applicant to the Medical Examiner as recorded by him and signed by the applicant, and this certificate shall constitute the agreement between the Association and the member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the articles of incorporation, or the Constitution, Laws and By-Laws of the Association made subsequent to the issuance of this certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all

respects the same as though such changes, additions or amendments were in force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this certificate shall be null and void. Should this certificate become void for any cause, acceptance of any payment from or for the member, or other act by any Camp Officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract.

In Witness Whereof, Pacific Woodmen Life Association at Omaha, Nebraska, has caused this certificate to be signed by its President and Secretary, and the corporate seal thereof to be impressed thereon, this 30th day of September, A.D. 1935.

D. E. BRADSHAW,  
President.

Attest:

R. FITZGERALD,  
(Inspected and Counter-  
signed.)  
J. S. SATES,  
Secretary.

(Corporate Seal)

Ten Year Renewable Term.

I have read the above certificate and accept the same, and warrant that I am now in good

health and have not been sick or injured since the date of my application.

This, the 26th day of September, 1935.

/s/ ERIC A. KRUSSMAN.

Witness: BAZIL FLEMING,  
Financial Secretary. [4]

REGISTER OF CHANGE OF  
BENEFICIARY

Note: Only the last appearing endorsement in effect.

Beneficiary changed to Marian Alice Krussman, Daughter.

See request for change.

Date Endorsed: 5-29-40.

Endorsed by Farrar Newberry.

PACIFIC WOODMEN LIFE  
ASSOCIATION

Life Insurance.

Ten-Year Term

Certificate.

Sovereign

Eric A. Krussman

729 W. Center St.

Pocatello, Idaho.

Ctf. No. TE- 1321001 Amt.

Camp No. 7-Idaho \$5000.00.

IMPORTANT.

No camp or officer thereof nor any officer, employee or agent of the Assoc. has authority

to waive any of the conditions of this beneficiary certificate or of the Constitution and Laws of this Association.

### CONDITIONS,

First. This certificate is issued in consideration of the representations, warranties and agreements made by the person named herein in his application to become a member, in the form and as passed upon and accepted by the Medical Director, and in consideration of the payment made when introduced in prescribed form; also his agreement to pay all assessments and dues that may be required of him during the time he shall remain a member of this Association.

Second. If the admission fees, dues and assessments required of the person named in this certificate are not paid to the Financial Secretary of his Camp as required by the Constitution, and Laws of this Association, the certificate shall be null and void.

Third. There shall be no liability on the Pacific Woodmen Life Association under this certificate until the member named therein shall have paid all entrance fees, one advance annual assessment or monthly installment of annual assessment for the month, signed this beneficiary certificate, and the acceptance slip attached thereto; been obligated or introduced by a Camp or authorized deputy in due form and



had manually delivered into his hands, in person, this beneficiary certificate while in good health. The foregoing provisions are hereby made a part of the consideration for and are conditions precedent to the payment of benefits under this Certificate.

Fourth. No legal proceedings for recovery under this certificate shall be brought within ninety days after receipt of proof of death by the Secretary of the Association, and no suit shall be brought upon this certificate unless said suit is commenced within one year from the date of death.

Fifth. If the applicant misstates his age, or if the amount of assessment collected is less than the required rate, for his correct age, then the benefits payable under the certificate shall be such an amount as the rate paid by the applicant would have purchased at his correct age. [5]

And thereby insured the life of the said Eric A. Krussman in the sum of Five Thousand and No/100 Dollars (\$5,000.00), which said certificate of insurance was in full force and effect at the time of his death.

#### IV.

That the said Eric A. Krussman, during his lifetime, fully complied with the requirements of the articles of incorporation of the constitution and laws of the defendant, and with all its regulations

and by-laws in force at the time of the issuance of said certificate, and thereafter adopted, and performed all of the agreements and conditions of said certificate on his part to be performed except the provision requiring the making of monthly payments of installments on or before the last day of the month in which they became due, which requirement and provision was waived by the defendant as follows:

That for more than three years prior to the death of Eric A. Krussman, it was the practice and general custom of the defendant in the course of dealing with a number of its members in the community in which the said Eric A. Krussman lived, and particularly with the said Eric A. Krussman to permit and accept monthly payments of installments on certificates of insurance after the month in which said payments became due, and plaintiff further alleges that the defendant's Financial Secretary, agent and representative in Pocatello, Idaho, for more than three years prior to the death of the said Eric A. Krussman was in the habit of personally collecting and did collect monthly payments of installments on the certificate above set forth covering the life of the late Eric A. Krussman after the month in which they became due, and during said time the said financial secretary almost invariably called at the residence of the insured herein for the payment of monthly installments on said certificate after the month in which the said [6] monthly installments became due, and in one or more instances

collected monthly installments for more than one month after the month in which the same became due, and that such over-due monthly installments were transmitted by said Financial Secretary to the defendant long after the month in which they became due and after the date required by Section 109 of the constitution, laws and by-laws of the defendant requiring the Financial Secretary to forward remittances on or before the 5th day of each month, and said defendant accepted and retained each and all of said installments so paid by the late Eric A. Krussman or by someone in his behalf. Plaintiff further alleges that said defendant, on or about February 1, 1940, paid to the said Eric A. Krussman the sum of \$10.55 representing gains and savings affected by said defendant apportionable to said certificate, which plaintiff is informed and believes and alleges was for the year 1939, and is informed and believes and on that ground alleges that from the time of the issuance of said certificate the said defendant annually paid to the late Eric A. Krussman an amount representing gains and saving affected by the society apportionable to said certificate, the amount of such annual payments so made being unknown to the plaintiff, except the payment of \$10.55 above mentioned, and plaintiff further alleges that on May 29th, 1940, the defendant endorsed change of beneficiary upon said policy from Sagred Marie Krussman, wife of said insured, to Marian Alice Krussman, his daughter; that on account of such course of dealing on



the part of defendant, the insured herein was led to believe and did believe and understand that prompt payment of the monthly installments would not be required, but that they would be received and accepted after due, and that said insured would be considered in good standing; that the insured, relying on the acts and conduct of the defendant and the custom and general course of dealing, as aforesaid, made payment of all premiums up to [7] the date of his death, as aforesaid, which were accepted and retained by the defendant who knew the same were not made in strict conformity with the certificate constitution, laws and by-laws of the defendant, and the defendant has by said acts, conduct and custom waived prompt payment and strict performance of the provisions in its certificate, constitution and by-laws, and is now estopped to invoke a forfeiture of said contract for failure to make prompt payments.

## VI.

That on or about the 29th day of May, 1940, the beneficiary in said certificate was changed from Sagred Marie Krussman, wife of the insured, to Marian Alice Krussman, daughter of the insured, and that thereafter, to-wit on or about the 17th day of June, 1940, the said Eric A. Krussman delivered to Bazil Fleming, defendant's Financial Secretary of Bannock Camp No. 7. Pocatello, Idaho, a written request to change the beneficiary in said certificate from Marian Alice Krussman, his daugh-

ter, to his son, Harry E. Krussman, together with said certificate, and at about said time the said Basil Fleming acknowledged in writing on said request receipt of said certificate, and executed his statement in writing thereon that "it is understood that the change of beneficiary is now in effect," copy of which request, acknowledgement and statement is hereto annexed marked Exhibit "A" and by this reference made a part of his complaint the same as if set out at length; that a short time prior to the delivery of said request, as aforesaid, it had been orally agreed in substance between Eric A. Krussman and his son, Harry E. Krussman, that the said Eric A. Krussman was going to change the said certificate from Marian Alice Krussman to Harry E. Krussman and make it payable to Harry E. Krussman with the understanding that said Harry E. Krussman would receive the proceeds thereof in trust for the following purposes;—that is to say that he would use Three [8] Hundred Dollars (\$300.00) for the payment of burial expenses of said Eric A. Krussman; pay to Beatrice Krussman Ginzle, the insured's daughter, the sum of Seven Hundred Dollars (\$700.00) and hold in trust the remaining Four Thousand Dollars (\$4000.00) to be paid to Marian Alice Krussman for her use, enjoyment, support and education at the discretion of the said Harry E. Krussman, the trust to last until she reaches the age of majority; and the said Harry E. Krussman agreed to accept said trust; that the terms of said trust were later re-

duced to writing by a letter from Eric A. Krussman to Harry E. Krussman and a letter in reply thereto from H. E. Krussman accepting said trust, who is one and the same person as Harry E. Krussman, to said Eric Krussman, both of which letters are written on the same page and a copy thereof is hereto attached marked Exhibit "B" and by this reference made a part of this complaint the same as if set out at length.

#### VII.

That ever since the delivery of said request to said Financial Secretary, the plaintiff was and now is the beneficiary under said certificate, as trustee of an express trust, as aforesaid and that this action is brought by the plaintiff as such trustee; that plaintiff is informed and believes and on that ground alleges that since the death of said insured, there has been and still is in the treasury of the defendant a sufficient sum to pay the plaintiff's claim and all other just claims against the defendant.

#### VIII.

That Eric A. Krussman died on or about the 3rd day of August, 1940, and that this plaintiff on the ..... day of August, 1940, more than ninety days before the commencement of this action furnished the defendant proof of death of Eric A. Krussman, and such other information as was required by the defendant, together with the [9] benefit certificate above mentioned and performed all the conditions



of said certificate and of the constitution, laws and by-laws of the defendant required to be performed on his part.

IX.

That defendant has refused to pay the amount due this plaintiff under said certificate or any part thereof, and that no part so due under said certificate has been paid, and that the said sum of Five Thousand Dollars (\$5,000.00) is now due thereon from the defendant to the plaintiff, together with interest thereon at the rate of six (6) per cent per annum from the 3rd day of August, 1940.

Wherefore, plaintiff prays judgment against the defendant in the sum of Five Thousand and No/100 Dollars (\$5,000.00), together with interest thereon at the rate of six (6) per cent per annum from July 3, 1940, until paid, and for all costs of suit.

JONES, POMEROY & JONES,  
Attorneys for Plaintiff,  
Residence and P. O. Address,  
Pocatello, Idaho.

State of Idaho,  
County of Bannock—ss.

T. D. Jones, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action and makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is absent from Bannock

County, Idaho, where this affiant resides and maintains his office; that he has read the above and foregoing complaint, knows the contents thereof, and the facts therein stated he believes to be true.

T. D. JONES.

Subscribed and sworn to before me this 5th day of February, 1941.

(Seal) M. H. McGLONE,

Notary Public for the State of Idaho Residing at Pocatello, Idaho. [10]

Exhibit "A"

Pocatello, Idaho  
June 17, 1940

Mr. Basil Flemming  
Financial Secretary  
Bannock Camp # 7  
Pacific Woodman Life Association  
Omaha, Nebraska

Cashier Dept. M.  
Aug. 8, 1940

Dear Sir:

Referring to Certificate #T E 1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marian Alice Krussman to my son, Harry E. Krussman.

I will appreciate your attention to this immediately. I am herewith turning over to you my certificate #T E 1321001, and would appreciate your



attending to the matter at your earliest possible convenience.

Yours sincerely,

/s/ E. A. KRUSSMAN

Received August 8, 1940

Claim Dept.

Acknowledging Certificate #T E 1321001, for which I hereby receipt for receiving same.

/s/ BAZIL FLEMING

It is understood that this change of beneficiary is now in effect.

/s/ BAZIL FLEMING. [11]

Exhibit "B"

Pocatello, Idaho,  
June 20, 1940.

Mr. Harry E. Krussman,  
Twin Falls, Idaho.

My dear Harry:

As you know, from our discussion here last Sunday, I hold Certificate No. TE 1321001, Policy in Pacific Woodman Life Association, for the sum of \$5,000.00 payable to Marian Alice Krussman as beneficiary. I explained to you there were spiritual reasons that I did not want to have a guardian appointed over Marian for the collection and disposition of the proceeds of said policy; and in order to obviate the necessity of appointing a guardian, that I was going to change the beneficiary in the policy and make it payable to you, with the understanding of course that you would receive the pro-

ceeds in trust for the following purposes, that is to say, that you would use \$300 of the same for my burial expenses, pay to Beatrice Krussman Ginzell, my daughter, \$700; and the remaining \$4,000.00 to be held in trust and paid by you to Marian Alice Krussman for her enjoyment, support and education. That the payments to be made to her shall be at your discretion, as I know you will handle the matter for her best interests, the trust to last until she shall arrive at the age of majority, when the balance shall be paid to her by you.

At the time I had the discussion with you, you stated that you would be willing to accept the trusteeship, and handle the matter as I desire. As you know, I have always been grateful to you for what you have done, and for what you will do in taking care of this matter, which is the most important thing to me which I can conceive of.

With love from your father,  
/s/ ERIC A. KRUSSMAN.

Twin Falls, Idaho  
June 25, 1940.

Mr. Eric Krussman  
Pocatello, Idaho.

Dear Father:

I have just received the foregoing letter from you in which you refer to the conversation we had, and in which you state you are going to change the beneficiary under the certificate above described, from Marian Alice Krussman to myself, in order

that I may receive the proceeds direct and handle the same as directed in the above letter.

In the event that I am made beneficiary under such certificate, I hereby agree to accept the terms of the trust above set out and agree that if, as and when any moneys shall come into my hands as the proceeds of Certificate No. TE 1321001, policy in Pacific Woodman Life Association, I will use the sum of \$300 thereof for the payment of your burial expenses, immediately pay [12] to your daughter, Beatrice Krussman Ginzle the sum of \$700 and hold in trust the sum of \$4,000, being the remaining proceeds of said policy, for the use, enjoyment, benefit, education and support of your daughter, Marian Alice Krussman, part or all of said \$4,000 to be paid to her during the time she is under the age of majority as in my discretion shall appear to be most beneficial to her; and I further agree that any of the said Trust fund belong to said Marian Alice Krussman remaining in my hands after she shall have reached the age of majority will be by me paid to her.

Your son,

/s/ H. E. KRUSSMAN.

[Endorsed]: Filed in County Court Feb. 5, 1941.

[Endorsed]: Filed in U. S. District Court March 26, 1941. [13]



[Title of County Court and Cause.]

ORDER ON REMOVAL OF CAUSE TO THE  
UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF IDAHO, EASTERN  
DIVISION

This Cause came on for hearing upon the petition of Omaha Woodmen Life Insurance Society, a corporation, the above named defendant, for an order removing this cause to the District Court of the United States, for the District of Idaho, Eastern Division; and it appearing to the Court that said petition is in due form and is presented for filing within the time required by law, and that the bond accompanying said petition is conditioned as provided by law; that the notice required by law of the presentation and filing of said petition and bond had, prior to the presentation and filing thereof been served upon the plaintiff, which notice the Court finds is sufficient and in accordance with law; and it appearing to the court that this is a proper cause for removal to the District Court of the United States, for the District of Idaho, Eastern Division;

Now therefore it is hereby ordered, adjudged and decreed that the said bond be, and the same is hereby accepted and approved; and that the above entitled cause be, and the same is hereby removed to the District Court of the United States, for the District of Idaho, Eastern Division, and that all further proceedings in this court be stayed, and the

Clerk of this Court is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, [14] Eastern Division, on or before thirty days from the date of filing of said petition.

Done in open Court this tenth day of March, 1941.

JAY L. DOWNING

District Judge

[Endorsed]: Filed March 10, 1941. [15]

---

In the District Court of the United States, for the  
District of Idaho, Eastern Division.

HARRY E. KRUSSMAN, as Trustee of an express  
trust,

Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE  
SOCIETY, a corporation,

Defendant.

### ORDER

The Stipulation of the above named parties, through their counsel of record, signed and dated March 31, 1941, for an enlargement of time to further plead, having been presented to the Court, the same is hereby in all respects approved and the time within which the defendant may further plead, as in said Stipulation provided, is hereby enlarged

and extended up to and including the 1st day of May, 1941.

Dated, this 31st day of March, 1941.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed April 1, 1941. [16]

---

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Omaha Woodmen Life Insurance Society, a corporation, and, without waiving any particular defense available to it by pleading any other defense, but expressly relying upon each and all of them, and for Answer to the complaint of the plaintiff on file herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation of said complaint not hereinafter specifically admitted.

II.

Answering Paragraph numbered I of said complaint, the defendant admits the allegations therein contained and alleges that it is incorporated under the laws of the State of Nebraska, with a lodge system, a ritualistic form of work and a representative form of government, without capital stock, and transacts its business without profit and for the

sole benefit of its members and their beneficiaries, and that it is now and at all times mentioned in said complaint has been organized and operated as a fraternal benefit society pursuant to the laws in such case made and provided. [17]

### III.

Answering Paragraph numbered II of said complaint, the defendant admits that on or about the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof and there was issued to him a Ten-year Term Insurance Certificate substantially as set out in Paragraph III of said complaint, but defendant denies that the said Eric A. Krussman remained such member in good standing and denies that he was entitled to all or any of the privileges and benefits appurtenant to said membership at the time of his death which occurred August 3, 1940, but alleges in this respect that sometime prior to his death he became suspended and said Certificate became void and was void at the time of his death.

### IV.

Answering Paragraph III of said complaint, defendant admits that there was executed and delivered to Eric A. Krussman a certain written and printed Certificate bearing date of the 30th day of September, 1935, substantially in words and figures as set out in said Paragraph, but defendant denies that said Certificate of Insurance was in force and



effect at the time of the death of Eric A. Krussman. [18]

V.

Answering Paragraph numbered IV of said complaint, the defendant admits that Eric A. Krussman, during his lifetime complied with the requirements of the Articles of Incorporation and of the Constitution and Laws of the defendant and with all of its regulations and By-Laws in force at the time of the issuance of said Certificate and thereafter adopted, except as alleged in this Answer, and that he performed all of the agreements and conditions of said Certificate on his part to be performed except the provision requiring the making of monthly payments of installments on or before the last day of the month in which the same became due, but denies such requirement and provision was waived by the defendant as alleged in said paragraph or at all. Defendant admits that on or about February 1, 1940, it paid Eric A. Krussman the sum of \$10.55. Defendant positively denies each and every other allegation contained in said numbered paragraph.

Further answering said paragraph, defendant alleges that the payment made on behalf of Eric A. Krussman by check dated July 19, 1938, for the June, 1938, installment, and all subsequent payments were made after said Certificate had terminated and become void and were for reinstatement of said member under the provisions of Section 65 of the Constitution, Laws and By-Laws of said de-



fendant, and such payments were accepted by the defendant under the warranty of good health and without knowledge on its part of the fact that the said Eric A. Krussman was in ill-health and could not have been reinstated, and by reason of the premises and of the provisions of the contract, which includes the Constitution, Laws and By-Laws, said Certificate remained void and defendant waived no rights and is not estopped to deny liability by accepting such delinquent payments or for any other reason. [19]

## VI.

Answering Paragraph numbered VI of said complaint, defendant denies that on or about the 29th day of May, 1940, or at any other time, there was a change of beneficiary in said Certificate from Sagred Marie Krussman, wife of assured, to Marion Alice Krussman, or that later there was any change from Marion Alice Krussman to Harry E. Krussman, alleging in this respect that such changes could not have been made because said Certificate was at such times void and of no force or effect. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in said paragraph and upon this ground denies each and every other allegation contained therein.

## VII.

Answering Paragraph numbered VII of said complaint, the defendant admits that during the time mentioned in said complaint there has been and

there still is in the treasury of the defendant a sufficient sum to pay the amount demanded in said complaint, but defendant denies each and every other allegation contained in said paragraph.

### VIII.

Answering Paragraph numbered VIII of said complaint, the defendant admits that said Eric A. Krussman died on or about the 3d day of August, 1940, but denies each and every other allegation contained in said paragraph. Defendant alleges that such "Proofs of Death" which were submitted to it purported to be on behalf of Harry E. Krussman as an individual and not as a Trustee. [20]

### IX.

Answering Paragraph numbered IX of said complaint, the defendant admits that it has refused to pay the sums demanded by the plaintiff, but denies each and every other allegation contained in said paragraph.

Further answering said complaint, and by way of an additional and affirmative defense thereto, the defendant alleges:

### I.

That the defendant is a corporation organized without capital stock and for the sole purpose of mutual benefit of its members and their beneficiaries and not for profit, and having a lodge system with ritualistic form of work and a representative form of government; that it has the power and does

issue certain insurance certificates for the benefit of its members, one of which said certificates was on or about the 30th of September, 1935, issued to one Eric A. Krussman, and is the Certificate referred to in the complaint.

## II.

That said Certificates, and particularly the one issued to Eric A. Krussman, contained, among other things, the following express provision:

“This Certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all Amendments to each thereof which may be made hereafter; the Application for membership, signed by the applicant and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the Applicant to the Medical Examiner as recorded by him and signed by the Applicant, and this Certificate shall constitute the agreement between the Association and the Member, and copies of the same, certified by the Secretary of the [21] Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association made



subsequent to the issuance of this Certificate, shall bind the Member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in full force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the Member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the Member, or other act by any Camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract."

### III.

That the application referred to in said Certificate, among other things, provides:

"I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of

the Pacific Woodmen Life Association, whether printed or referred to therein or not.

“I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure.” [22]

#### IV.

Section 63 of the Constitution, Laws and By-Laws of said defendant, in so far as the same has application to this case, provides:

“Sec. 63(a). In order to accumulate and maintain funds for the payment of benefits stipulated in Beneficiaries Certificates held by the Members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these Laws or by the provisions of his Beneficiary Certificate, which shall be credited to and



known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the By-Laws of his Camp.

“(b) If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his Beneficiary Certificate shall be void, the Contract between such person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said Member from the delivery of his Certificate to the date of his suspension. \* \* \* ”

## V.

Section 65 of the Constitution, Laws and By-laws provides:

“Any member who has become suspended because of the nonpayment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making

such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these [23] Laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

## VI.

Section 66 of the Constitution, Laws and By-Laws provides:

"Section 66(a). The retention by the Association of any installment of assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.

"(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact

in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void.”

## VII.

Section 82 of the Constitution, Laws and By-Laws, among other things, provides:

“Sec. 82(a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of Camps—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such Laws or requirements. Each and every Beneficiary Certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association.” [24]



## VIII.

That Section 107 (g) of the Constitution, Laws and By-laws of the defendant, adopted June, 1939, and which Section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws, provides:

“The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-laws of this Society nor to bind the Society by any such acts.”

## IX.

That all of the above quoted provisions of the Constitution, Laws and By-Laws, were in force and effect when said certificate was written and became part of said contract and remained such during the life thereof; that by quoting said provisions defendant does not waive any other pertinent provision of said Constitution, Laws, By-Laws, Application or Certificate applicable to the matters herein alleged and to the defenses herein asserted.

## X.

That pursuant to the provisions of said contract the said Eric A. Krussman agreed to pay the assessments and dues in installments of \$11.70 per month and further agreed that said sum should be paid before the last day of the month for which



said installment became due and if the same were not so paid the Certificate would automatically terminate and become void and the member suspended. That the said Eric A. Krussman failed to pay the installment for the month of June, 1938, as provided in said Certificate on or before the last day of June, 1938, and by reason thereof and of the provisions of the Constitution, Laws and By-Laws of the defendant, he thereby became suspended and said Certificate became null and void on the 1st day of July, 1938. That on July 19, 1938, a check was tendered the Financial Secretary for the installment which became due in June, 1938, and that thereafter each and every payment tendered the Financial Secretary was tendered subsequent to the month in which it would otherwise have become payable and in each [25] instance was made after the Certificate terminated and became void and the member suspended and while the said Eric A. Krussman was not in good health but in such condition of health that the said Certificate of Insurance could not have been reinstated and that said payments and each of them were accepted by the defendant without knowledge that the said Eric A. Krussman was in ill-health at said time, and because of the warrant of good health made by the tender of such delinquent payments as provided in Section 65 of the Constitution and Laws of the defendant.

## XI.

That on or about the 22nd of July, 1938, the said Eric A. Krussman became stricken with a disease or ailment from which he never recovered and which was the subsequent cause of his death in August, 1940; that when the payment by check dated July 19, 1938 was transmitted on behalf of the said Eric A. Krussman for the June, 1938, installment, the said Certificate of Insurance had been automatically cancelled and was void and of no force or effect; that the said Eric A. Krussman did not remain in good health for a period of thirty days after suspension within the meaning of the Contract, but on the contrary was in such condition of health that he could not have been accepted nor reinstated as a member of the defendant, nor could said Certificate of Insurance have been revived. That this same situation existed each and every month thereafter in that during each and every month the same default occurred and a similar condition of ill-health existed. That by the terms of the Contract, as hereinbefore recited, the tender of such payment was a guaranty, representation and warranty that said person on whose behalf such payment was tendered was in fact in good health, and was likewise a warranty that he would remain in good health for at least thirty days after the attempt to again become a Member; that in the acceptance of said payments said defendant acted upon said representation and warranty; that said warranty was false and untrue and the [26] defend-

ant did not know at any time after said default and prior to the death of the said Eric A. Krussman that it was false and that he was not in good health and the retention of said payments made after default did not and could not have constituted a waiver of any right or an estoppel of the defendant to resist payment under the Certificate. That the physical condition of health of said Eric A. Krussman after July 22d, 1938, as well as the failure on his part to advise the defendant of his ill-health, rendered it impossible to cause a reinstatement of said Certificate at any time after said default and the same remained void and of no force or effect.

## XII.

Defendant further alleges that whether or not the "Financial Secretary" knew of the condition of health of the said Eric A. Krussman when said delinquencies were tendered (the knowledge of which is hereby denied) was wholly immaterial by reason of the matters and things hereinbefore alleged and particularly the provisions of the Constitution, Laws and By-Laws, and that his transmission of said funds to the Secretary of the defendant corporation even though after the date when the same should have been transmitted could not and did not constitute a waiver of any of the provisions of said contract, nor, for the reasons hereinbefore stated, constitute any estoppel of the defendant in asserting its rights herein.



**XIII.**

Defendant further alleges that it did not learn of the condition of health of the said Eric A. Krussman until sometime after his death; that thereupon and upon learning that said installments had been paid on behalf of said Eric A. Krussman after forfeiture of said contract the said defendant did thereafter make written tender to the said Harry E. Krussman of the payments made between and including July, 1938, and August, 1940, aggregating \$294.80, less [27] the sum of \$10.55 heretofore paid upon the erroneous assumption that the said Eric A. Krussman was in good health and which tender was refused; that defendant hereby again renews said tender and now offers to pay to the plaintiff herein said sum and to keep said tender good.

Further answering said complaint, the defendant alleges:

**I.**

That said complaint does not contain facts sufficient to constitute a cause of action against the defendant.

Further answering said complaint, the defendant alleges:

**I.**

That this action has not been brought by the real party in interest.

Wherefore, defendant prays that said action be dismissed and that defendant have such further, or



other relief as to this Honorable Court seems meet and equitable, including its costs herein incurred.

RAINEY T. WELLS

Residing at Omaha, Nebraska

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for Defendant

(Duly verified) [28]

Service of the foregoing Answer, by receipt of copy thereof, acknowledged this 1st day of May, A. D. 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff,

Residing at Pocatello, Idaho.

[Endorsed]: Filed May 1, 1941. [29]

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[Title of District Court and Cause.]

**MOTION TO AMEND BY INTERLINEATION**

Comes now the defendant, and in order to conform to the proofs heretofore adduced in depositions, and to more accurately state the facts involved in the defense of said cause, moves the above entitled court for permission to amend its Answer on file herein by interlineation, in the following particulars, to-wit:

I.

In Paragraph numbered X of defendant's additional affirmative defense, on Page 9 of said pleading:

(a) Delete from Line 8 the words "July, 1939" and insert in lieu thereof the words "June, 1938."

(b) Delete from Line 9 of said paragraph the words "July, 1939", and insert in lieu thereof the words "June, 1938."

(c) Delete from Line 12 the words "August, 1939", and insert in lieu thereof the words "July, 1938" and in the same line delete the words "August 24, 1939" and insert in lieu thereof the words "July 19, 1938." [30]

(d) Delete from Line 14 the words "July, 1939" and insert in lieu thereof "June, 1938."

II.

In Paragraph XI of said pleading, on page 10 thereof:

(a) Delete from Line 1 of said Paragraph the words "Month of August" and insert in lieu thereof the words "22nd of July."

(b) Delete from Lines 4 and 5 of said paragraph the words "August 24, 1939", and insert in lieu thereof the words "July 19, 1938."

(c) Delete from Line 6 of said paragraph the words "July, 1939" and insert in lieu thereof the words "June, 1938."

(d) Delete from Lines 8 and 9 of said paragraph the words "was at that time not in good

health", and insert in lieu thereof the words "did not remain in good health for a period of 30 days after suspension."

(e) Delete from Line 7, on Page 11 of Paragraph No. XI the word "August", and insert in lieu thereof the words "the 22nd of July."

### III.

In Paragraph XIII, on page 11 of said pleading:

(a) Delete from Lines 5 and 6 the words "On or about the 14th day of November, 1940" and insert in lieu thereof the word "thereafter."

(b) From Line 8 of said paragraph, delete the words "August, 1939" and insert in lieu thereof the word "July, 1938", and delete from said line the figure "\$163.80" and insert in lieu thereof "294.80."

Dated October 6, 1941.

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

RAINEY T. WELLS

Residing at Omaha, Nebraska

Attorneys for Defendant

[Endorsed]: Filed Oct. 13, 1941. [31]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF  
OCTOBER 13, 1941

The defendant's motion to amend the answer by interlineation was granted by the Court. [32]

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[Title of District Court and Cause.]

OPINION

T. D. Jones, Pocatello, Idaho

Ralph H. Jones, Pocatello, Idaho

Attorneys for the plaintiff

A. L. Merrill, Pocatello, Idaho

R. D. Merrill, Pocatello, Idaho

Attorneys for the defendant

December 5, 1941

Cavanah, District Judge:

The action was brought by the plaintiff as Trustee, against the defendant, to recover upon a certificate of insurance issued by the Pacific Woodmen Life Association, in the sum of \$5,000 to Eric A. Krussman, payable to his wife Sagred Marie Krussman, beneficiary. The beneficiary was thereafter changed with directions to distribute the proceeds of the certificate, the sum of \$4,000 to Marian Alice Krussman a daughter; \$700 to Beatrice Krussman Ginzle, a daughter, and \$300 for burial expenses.

Since the issuance of the certificate the Pacific Woodmen Life Association was changed to the de-



fendant, The Omaha Woodmen Life Insurance Society.

On August 2, 1940, Eric A. Krussman died and proof of loss was made within the required time. At the time of Krussman's death all installments had been paid. The claim for the insurance was rejected by the defendant, it being claimed by it that the payments of the installments for July, August, September, October, November and December in the year 1939, and for [33] January, February, March, April, May and June in the year 1940 were not paid before the last day of the month in which the installments were due under the certificate of insurance.

At the time the claim for insurance was made to and rejected by the defendant, there was inclosed in the letter of rejection a check or refund warrant payable to the plaintiff in the sum of \$153.25, which the defendant claimed was to cover installments paid by the insured from July 1939 to and including the months of January, February, March, April, May and June 1940, less \$10.55 theretofore paid in February 1940 as gains and savings apportionable to the certificate, which were returned to the defendant. Some nine months thereafter, the defendant made a new tender of \$294.80 to cover all assessments paid by the insured subsequent to July 1, 1938, less distribution of gains and savings paid on the certificate in 1939 and 1940, which the plaintiff refused.

It seems that at the time from the issuance of

the certificate until the death of the insured some of the installments were not paid during months due, but were accepted by the financial secretary and the proceeds transmitted to the defendant, who retained the same and applied them upon payments in arrears, all of which payments were made by checks excepting two were made payable to the defendant and bore date. They were drawn by Eric A. Krussman or by someone in his behalf and were received and endorsed by the defendant. It does not appear that any notice or claim was given to the insured that his certificate was not in full force. The defendant in a letter of February 1940, to the insured informed him that its directors had authorized payment of a cash refund for 1939 on certificates in force two or more years, and inclosed check for \$10.55, and such payments were made to the insured during 1938, 1939 and 1940 representing gains and savings apportionable to his certificate. These letters recognized that Krussman was in good standing and whether a waiver of forfeiture of a certificate of insurance will be found depends on the effect which the conduct or course of business of the insurer has had upon the insured and [34] is not limited to what the intention of the insurer was. *Rasicot v. Royal Neighbors of America*, 18 Idaho 85; 108 Pac. 1048.

There does not appear any concealment of Krussman's illness, as the financial secretary, or agent of the defendant, had knowledge of insured's condition immediately after his first stroke.

Section 105 of defendant's constitution and by-laws (1939 edition) provides: "The financial secretary shall have charge of all of the accounts of the members and attend to the correspondence concerning the standing of the members \* \* \* he shall make all reports and mail or deliver all notices required \* \* \* etc." It appearing that the financial secretary, the agent of the defendant had knowledge of Krussman's condition, which he acquired within the scope of his powers and duties and it is presumed that he performed his duty as required by the regulations, and the defendant had actual knowledge of insured's condition, and if he failed to advise his principal of insured's illness, still, knowledge of such illness on the part of the financial secretary, which he acquired while acting as agent of the defendant would be imputed to the defendant. It is conclusive presumption, in absence of fraud, that the agent seasonably communicated the fact of insured's condition to the defendant. *Rasicot v. Royal Neighbors supra.*

The principal question under the evidence is that Krussman was never suspended or reinstated, as the payments made by him, although out of time, were not made for the purpose of again making him a member. If he was not suspended he never ceased to be a member. It cannot be said under the evidence that he was suspended or reinstated because he never was treated as a suspended member by either the financial secretary or the home office. They never advised him of such and his money



was accepted and retained, and no one connected with the defendant ever advised him that his money was accepted and retained by the defendant merely for the good of the order. [35]

These payments were made to continue the certificate in force, and not for reinstatement. It is fair to say that while the contract of insurance provides for the payments to be made within a specified time, the financial secretary permitted the insured to make the payments after that time and they were sent in and accepted and retained by the defendant over a long period. They treated the certificate as still continuing.

That being true the question of reinstatement is not here involved for the payments made within the time recognized by the defendant are sufficient to keep the policy alive was sufficient to avoid a suspension or forfeiture, and therefore there was no occasion for reinstatement. *Conklin vs. Knights and Ladies of Security*, 166 N. W. 384.

It seems to be the sound rule that if an Association like the defendant adopts the custom of receiving payment of dues after the day named in the contract for such payments, which leads the insured to believe that his policy would not be forfeited if he continues to pay in accordance with such custom, an insurer thereby waived the right of forfeit of the policy. *Chandler v. Royal Highlanders*, 162 N. W. 642. *Kennedy v. Grand Fraternity*, 92 Pac. 971.



The basis upon which the doctrine of waiver stands is that it has for its existence the assumption that by reason of the action of the Association, the insured has been misled to his prejudice, and because the insured did not strictly observe the precise time of payment it ought not to be held to forfeit his rights.

Attention is directed to Section 40-2331 I. C. A. which relates to the authority of adoption of by-laws and that local camp officers cannot waive any of the provisions of the policy does not prevent the association itself from waiving the provisions of its constitution and by-laws, or prescribe changes of rules of agency as the defendant has done here.

[36]

The Supreme Court of Idaho in the case of *Rascicot v. Royal Neighbors of America*, supra, approved the principle enunciated by the Iowa Supreme Court in the case of *Trotter v. Grand Lodge Legion of Honor*, 132 Iowa 513; 109 N. W. 1099, where it was said by the Iowa Supreme Court: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applied to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against who it is asserted, but on the effect which its conduct or

course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake." And announces the principle in Idaho that waiver applies to fraternal associations the same as other insurance companies, and gives effect to any circumstance or act which it may be fairly contended that the insurer has waived a right to strict performance by the insured, and whether forfeiture of a policy of insurance exists depends not on the intention of the insurer but on the effect which its course of business or conduct has upon the insured, and that the financial secretary is the agent of the defendant, and being the agent, the presumption is, in absence of fraud, that he seasonably conveyed to the defendant knowledge which he acquired while acting within the scope of his authority.

And the Ninth Circuit Court of Appeals in the case of *Order of United Commercial Travelers vs. Campbell*, 115 Fed. (2) 743, settled the primary question here involved effecting the liability of the defendant after referring to the Washington Court, of adhering to the rule that by-laws of a fraternal insurance society may be waived by custom acquiesced in by the society, said: "The acts and declarations evidencing the custom may be those of the society itself or those of its agent. And this is true even though the constitution of the order provides that the collecting [37] officer of the local organization has no power to waive the provisions of the constitution. As a matter of law, the knowledge of

the agent is the knowledge of the society. *Peterson v. Modern Woodmen of America*, 127 Wash. 412; 220 Pac. 809.

“Too, it is the rule that the existence of a waiver depends upon the effect of the insurer’s actions upon the insured, not upon what the insured intends. If the conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture. *Morgan v. Northwestern National Life Co.*, 42 Wash. 10; 84 Pac. 412.”

There can be no question under the evidence here but that the defendant had actual knowledge of the times of payments by the insured as the checks for payment of monthly installments were made directly payable to the defendant and forwarded to it.

As to the contention that under the contract of insurance no provision is made for a trustee in trust to be beneficiary and the change of beneficiary was not made in accordance with its terms it is sufficient to say that it appears that Eric A. Krussman made the request in writing to the defendant’s financial secretary to change the beneficiary from Marian Alice Krussman to his son Harry E. Krussman who was to distribute the proceeds as stated, and the terms of the trust are set forth in a letter from Eric A. Krussman to his son and accepted.



would not defeat the right of the plaintiff to sue and recover on the policy.

The views thus expressed under the evidence, the defendant waived the forfeiture of the certificate of insurance and the plaintiff is entitled to judgment as prayed for, and costs.

[Endorsed]: Filed Dec. 5, 1941. [38]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly to be heard on the 22nd day of October, 1941, before the Hon. Charles C. Cavanah, District Judge, sitting without a jury, trial by jury having been waived by failure to make demand therefor. T. D. Jones and Ralph H. Jones appeared for and on behalf of the plaintiff, and A. L. Merrill, R. D. Merrill and Rainey T. Wells appeared for and on behalf of the defendant. Evidence was introduced by and on behalf of the plaintiff and the defendant upon the issues raised by the pleadings filed in this cause. At the close of the evidence oral arguments were made by the respective parties and briefs were received from said parties and duly considered by the Court, and the Court being now fully advised in the law and the premises makes and enters the following:



## FINDINGS OF FACT

## I.

That the defendant now is, and ever since September 29, 1935 and for some time prior thereto has been a Fraternal Beneficiary Association incorporated under and by virtue of the laws of the State of Nebraska. That said defendant has a ritualistic form of work and representative form of government without capital stock and transacts business without profit for the sole benefit of its members and their beneficiaries. That the defendant qualified to do business in the State of Idaho as a foreign corporation, [39] doing business of insuring the lives of its members, and that ever since the time first aforesaid until about the 4th day of August, 1937, the said defendant was doing business under the corporate name of Pacific Woodmen Life Association, and that on or about said last mentioned date the Articles of Incorporation of said defendant were amended changing its corporate name from Pacific Woodmen Life Association to Omaha Woodmen Life Insurance Society, and that ever since about the 4th day of August, 1937, the said defendant has been doing business under the corporate name of said Omaha Woodmen Life Insurance Society.

## II.

That on the 30th day of September, 1935, one Eric A. Krussman was received into defendant corporation as a member thereof while it was doing

business under the corporate name of Pacific Woodmen Life Association under a ten-year term insurance certificate (Plaintiff's Exhibit 2), and remained such member in good standing and entitled to all the privileges and benefits appurtenant to said membership until his death which occurred on August 2, 1940.

That at the time the said Eric A. Krussman was so received as a member of said defendant corporation, the said defendant then doing business under the corporate name of Pacific Woodmen Life Association, duly executed and delivered to him a certain written and printed certificate bearing date the 30th day of September, 1935 (Plaintiff's Exhibit 2) and thereby insured the life of the said Eric A. Krussman in the sum of five thousand and no/100 dollars, which said certificate of insurance was in full force and effect at the time of his death.

### III.

That on May 29, 1940, the beneficiary named in said certificate was changed to Marian Alice Krussman, the insured's daughter, and her name was endorsed on said certificate of insurance; and that thereafter on June 17, 1940, the insured Eric A. Krussman, made a request in writing to Basil Fleming, [40] Financial Secretary of the defendant, at Pocatello, Idaho, to change the beneficiary from Marian Alice Krussman to his son, Harry E. Krussman (Plaintiff's Exhibit No. 15) who was to

distribute the proceeds of the certificate as Trustee, as follows: the sum of \$4000.00 to Marian Alice Krussman, daughter of Insured, and \$700.00 to Beatrice Krussman Ginzel, daughter of insured, and \$300.00 for burial expenses. The terms of the trust are set forth in a letter from Eric A. Krussman to his son, Harry E. Krussman, dated June 20, 1940. That the said Harry E. Krussman, who was one and the same person as H. E. Krussman, accepted the terms of the trust as recited in a letter to Eric Krussman from H. E. Krussman under date of June 25, 1940 (Plaintiff's Exhibit No. 16).

That Section 72 of the Constitution, Laws and By-laws of the defendant (Exhibits 3, 4 and 5) among other things provides that a person desiring to change the beneficiary or beneficiaries named in a certificate may do so by filing written request properly witnessed, giving the name or names of such new beneficiary or beneficiaries, and delivering same to the Financial Secretary of the camp for transmission to the Secretary of the defendant. It further provides that no change of beneficiary shall be allowed or binding on the defendant or any of the beneficiaries, which is not requested in writing more than 24 hours before the date of death of said member. The court finds that the request to change the beneficiary (Plaintiff's Exhibit 15) was delivered to said Basil Fleming, Financial Secretary, in the latter part of June 1940 and that Eric A. Krussman died on August 2, 1940.



## IV.

That the said Eric A. Krussman, during his lifetime, fully complied with the requirements of the Articles of Incorporation of the Constitution and Laws of the defendant, and with all its regulations and by-laws in force at the time of the issuance of said certificate and thereafter adopted, and performed all of the agreements and conditions of said certificate (Plaintiff's [41] Exhibit No. 2), and the Constitution, Laws and By-Laws of the defendant (Plaintiff's Exhibits No. 3, 4 and 5) on his part to be performed, except the provisions thereof requiring the making of monthly payments of installments on or before the last day of the month in which they became due. But the Court finds that all payments of monthly installments on said certificate from May 1936 until the date of the death of the insured, were made by checks drawn by Eric A. Krussman or someone in his behalf and made payable to the defendant; that said checks were delivered to Bazil Fleming, Financial Secretary of the defendant, and transmitted to the defendant, and were received and duly endorsed by the defendant, and the proceeds thereof applied by defendant in payment of overdue installments on said certificate of insurance, with the exception of two checks which were made payable directly to Bazil Fleming, Financial Secretary, and the proceeds thereof transmitted to the defendant and applied by the defendant in payment of overdue installments on said certificate of insurance. The Court further finds that one of the



checks made payable directly to Basil Fleming (Plaintiff's Exhibit G-5) was dated November 28, 1936, and was applied by defendant in payment of the installment for the month of October, 1936; and that the other check made payable directly to Basil Fleming (Plaintiff's Exhibit G-6) was dated December 14, 1936 and the proceeds thereof applied by the defendant in payment of the installment on said certificate for the month of November, 1936.

#### V.

The Court further finds that no payment after September, 1936, was made by Eric A. Krussman during the current month, except the payment for August, 1940, which payment was made the day before the death of said insured; and that in every instance since September, 1936, payment was made by the insured and accepted by the defendant in the month following the month in which payment of installment was due, and was applied by the defendant [42] for the installment for the previous month, excepting that in three or four instances the insured made payment for two previous months, which was accepted by defendant and applied upon payments of installments due for two previous months (Plaintiff's Exhibits No. 19 and G-1 to G-49 inclusive, and No. 12), and excepting the check dated August 1, 1940. That Basil Fleming, the Financial Secretary of defendant was in the habit of calling at the residence of the insured for

collection of said checks, and the court finds that the defendant had actual knowledge of the time each installment was paid for a period of nearly four years and had actual knowledge that since September 1936 none of the monthly installments were paid before the end of the month in which they became due, and that at the time of the death of the insured all installments had been paid upon said certificate; that the monthly rate of installment on said certificate was \$11.70, and that whenever monthly payment in excess of \$11.70 was made, the amount of such excess was credited back to Bazil Fleming, Financial Secretary of Camp No. 7 at Pocatello, Idaho to be applied on Mr. Eric A. Krussman's local camp dues.

## VI.

The court finds that the defendant forwarded a form letter to the insured dated February 25, 1938 (Exhibit F-1) enclosing refund check representing distribution of gains and savings on insured's certificate, and on February 25, 1939, forwarded form letter (Exhibit E) to the insured enclosing check (Exhibit F) stating among other things that "on account of economies effected in 1938 we are happily in position to make another refund to each of our members of over two years standing"; and on February 1, 1940 forwarded form letter (Exhibit C) with which was enclosed check for distribution of gains and savings (Exhibit D) in which letter it was stated among other things:

“Our board of directors has authorized the payment of a cash refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed.”

The court further finds that these refund checks were made to all [43] members who had been continuously in membership for two years or more and who were in good standing at the end of the year for which the checks were issued. The court finds that such letters, together with the checks enclosed, recognized that the insured was in good standing, and that the acts and conduct of the defendant and course of dealing on the part of defendant led the insured to believe, and he did believe and understand as a reasonable man that prompt payment of the monthly installments would not be required but that they would be received and accepted after due, and that insured would be considered in good standing, and the court finds that the insured was not suspended.

## VII.

The court finds that there is no evidence in the record that any notice or warning of any kind was ever given to the insured that his certificate was not in full force and effect.

## VIII.

The court finds that Eric A. Krussman died on August 2, 1940 and that proof of death was received by the Company on August 8, 1940; that on



November 14, 1940 beneficiary's claim for insurance was rejected by letter from defendant to plaintiff (Plaintiff's Exhibit 10) with which letter a check or refund warrant payable to plaintiff in the sum of \$153.25 was enclosed, which sum was to cover installments paid by insured from July 1939 to 1940 inclusive, less \$10.55 paid to insured in February 1940 as gains and savings apportionable to the certificate sued upon in this action, and that such tender was rejected. The court finds that more than nine months thereafter defendant made a new tender to plaintiff in the sum of \$294.80 to cover all monthly installments paid by insured subsequent to July 1, 1938, less the amount of distribution of gains and savings paid on said certificate by checks in 1939 and 1940. This tender was rejected.

### IX.

The court finds that said certificate issued to Eric A. Krussman contained among other things, the following express provision: [44]

“This certificate is issued and accepted subject to all the conditions set forth herein and on the reverse side hereof, and the provisions of the Constitution, Laws and By-Laws of the Association. The Articles of Incorporation and the Constitution, Laws and By-Laws of the Association, and all Amendments to each thereof which may be made hereafter; the Application for membership signed by the applicant



and approved by the Medical Director of this Association, and when a medical examination is made, the statements of the Applicant to the Medical Examiner as recorded by him and signed by the Applicant, and this Certificate shall constitute the agreement between the Association and the Member, and copies of the same, certified by the Secretary of the Association, shall be received in evidence as proof of the terms and conditions thereof. Any changes, additions or amendments to the Articles of Incorporation, or the Constitution, Laws and By-Laws of the Association made subsequent to the issuance of this Certificate, shall bind the member named herein and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments were in full force at the time of the application for membership and were written herein. If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the Member, this Certificate shall be null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the Member, or other act by any Camp officer or member of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract."

## X.

That the application referred to in said certificate, among other things, provides:

“I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the Association now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Association, whether printed or referred to therein or not.

“I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure.” [45]

## XI.

The Court finds that Section 63 of the Constitution; Laws and By-Laws of said defendant provides:

“Sec. 63 (a). In order to accumulate and maintain funds for the payment of benefits stipulated in Beneficiaries Certificates held by the Members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these Laws or by the provisions of his Beneficiary Certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues, as may be required by the By-Laws of his Camp.

“(b) If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his Beneficiary Certificate shall be void, the Contract between such person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said



Member from the delivery of his Certificate to the date of his suspension. \* \* \*”

## XII.

The court finds that Section 65 of the Constitution, Laws and By-Laws effective from September 1, 1935 to September 1, 1937, (Exhibit No. 3) provided as follows:

“Any person who has become suspended because of the non-payment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed



knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever." [46]

That said Section 65 was amended to take effect as of September 1, 1937 and as thus amended provided:

"Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

"Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making pay-

ments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

And that said Section 65 was again amended to take effect as of September 1, 1939, and as thus amended provided:

"Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

Whenever payments are made by a person who has been suspended for more than fifteen

days, for the purpose of again becoming a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or [47] his beneficiary or beneficiaries to any rights whatever."

### XIII.

The court finds that Section 66 of the Constitution, Laws and By-Laws of defendant provides:

"Section 66 (a) The retention by the Association of any installment or assessment paid



by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or any estoppel upon the Association.

“(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment or assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the Certificate shall be null and void.”

#### XIV.

The Court finds that Section 82 of the Constitution, Laws and By-Laws of the defendant provides among other things:

“Sec. 82 (a). No officer, employee or agent of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which Beneficiary Certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these laws, nor shall any custom on the part of any Camp or any number of Camps,—with or without the knowledge of any officer of such Association—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every Beneficiary Cer-



tificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these Laws by the Association or an estoppel of this Association."

#### XV.

The Court finds that Section 107 (g) of the Constitution, Laws and By-Laws of the defendant, adopted June, 1939, which section is substantially the same as the provisions of Section 109 (g) of the 1935 Constitution, Laws and By-Laws, provides:

"The financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts." [48]

#### XVI.

The court finds that the above quoted provisions of the Constitution, Laws and By-Laws of the defendant (Exhibits 3, 4 and 5) were in full force and effect when the said certificate was written, with the exception of the amendments to Section 65, and became a part of said contract and remained such during the life thereof, and that the amendments

to Section 65 became effective September 1, 1937, and September 1, 1939 respectively.

### XVII.

That under the terms of the contract the said Eric A. Krussman agreed to pay the assessments and dues, and installments of \$11.70 per month on or before the last day of the month in which said installments became due and if the same were not so paid the certificate would automatically terminate and become void and the member suspended; but finds that the insured was not suspended nor was his certificate null and void, and finds that Eric A. Krussman failed to pay the June 1938 installment on or before the last of June, 1938. The court finds that on July 19, 1938 a check was drawn by the insured in favor of the defendant which was received by the defendant on July 21, 1938 and endorsed and accepted by it and the proceeds applied for the June 1938 installment; that the same was received and accepted by the defendant for the purpose of continuing in force the insurance certificate (Exhibit 2), and the court finds that it is not true that after June 1938 every or any of the payments made by insured and received by the defendant were made after the certificate terminated and became void and the member suspended.

### XVIII.

The court finds that on or about July 22, 1938 the said Eric A. Krussman suffered a stroke from which he never fully recovered and that thereafter

he was in a condition of ill health until the date of his death, and that there was no concealment of [49] the illness of the said insured. That Bazil Fleming, the Financial Secretary, agent of the defendant, had actual knowledge of Krussman's condition from about the time of his stroke in July 1938 until the date of insured's death. That Section 105 (a) and (b) of the 1935 and 1937 Constitution, laws and by-laws (Exhibits 3 and 4) and Section 103 (a) and (b) of the 1939 Constitution, Laws and By-Laws (Exhibit 5) contain the same provisions; and that Section 111 of the 1935 and 1937 Constitution Laws and By-Laws, contains the same provisions as Section 109 of the 1939 Constitution, Laws and By-Laws and that said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said sections reading as follows:

“Sec. 103 (a) The President and Secretary of the Society shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp.

“(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and the Sovereign Camp fund payments and monthly installments



thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Society to the Secretary of the Society at the headquarters of the Society as provided for in Section 109.”

“Sec. 109. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Society to the Secretary of the Society. Such amounts shall be remitted in money order, certified check, bank cashier’s check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the Camp as shall be required for the information of the Secretary of the Society, upon blanks furnished for that purpose.”

That the said Bazil Fleming was the agent of the defendant and acquired knowledge of Krussman’s condition while he was acting within the scope of his powers and duties, and it is presumed that he performed his duty as required by the above quoted sections, and that such knowledge was communicated to the defen- [50] dant, and if not, would be imputed to the defendant.



## XIX.

That during the whole of the time that Krussman was in ill health and from the time of the issuance of his certificate of insurance the defendant treated him as a member in good standing and that none of said payments were made for the purpose of reinstatement, and that defendant waived prompt payment of monthly installments, and that none of said payments made to the defendant and retained by it was a guarantee, representation or warranty that the said insured was in fact in good health or that he would remain in good health for any period of time.

## XX.

That defendant, in accepting the payments after the end of the month in which they became due as above set out, did not act upon any guarantee, representation or warranty that the said Krussman was in good health, and there was no false or untrue warranty, and finds that knowledge had been imputed to the defendant prior to the death of Krussman that said Krussman was not in good health, and finds that retention of payments made after default as herein set out and the fact that the insured had been informed by the defendant during the years 1938, 1939 and 1940 as above set out, that he was in good standing, and the defendant's course of dealing constituted a waiver of the right of the defendant to insist upon prompt payment as in the contract provided and of the right to forfeit or terminate said contract, and could and

did constitute an estoppel on the part of defendant to resist payment under the certificate, and finds that said certificate was not void of or no force or effect after the 22nd day of July 1938 or at any time, but finds that the same was in full force and effect during said time and at the date of the death of the said Eric A. Krussman. [51]

### XXI.

The court finds that knowledge on the part of the Financial Secretary, Bazil Fleming, of the health of Eric A. Krussman during any of the time when payments were not made within the month in which they became due, was material, and finds that the receipt of the checks by the defendant corporation and the application of the same to overdue monthly installments, and the course of defendant's dealing with the insured, could and did constitute a waiver of the provisions of said contract, and could and did constitute an estoppel of defendant in resisting payment herein, and that the tender made by the said defendant as set out in Paragraph VIII of these findings was not made upon the erroneous assumption that Eric A. Krussman was in good health.

### XXII.

The ever since the delivery of the request to the said Financial Secretary (Plaintiff's Exhibit 15) set out in Paragraph III of these findings, which request was delivered more than 24 hours prior to the insured's death, the plaintiff was and now

is the beneficiary under said certificate as trustee of an express trust, and that this action is brought by the plaintiff as such trustee, and that ever since the death of said insured there has been and still is in the treasury of said defendant a sufficient sum to pay the plaintiff's claim and all just claims against the defendant. And the court finds that on the 8th day of August, 1940, more than 90 days before the commencement of this action, the plaintiff furnished the defendant proof of death and performed all the conditions of said certificate and of the Constitution and Laws and By-Laws of the defendant required to be performed on his part, and that the defendant has refused to pay the amount due the plaintiff under said certificate, or any part thereof, and that no part due under said certificate has been paid and that the sum of \$5,000 is now due thereon from the defendant to the plaintiff together with interest thereon at the [52] rate of 6% per annum from the 8th day of August, 1940, and costs of this action.

### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court duly finds and concludes as a matter of law:

1. That the complaint in this action states facts sufficient to constitute a cause of action against the defendant.

2. That the delivery of the request (Exhibit 15) to Bazil Fleming, Financial Secretary, was a compliance with the Constitution, Laws and By-Laws



of the defendant for change of beneficiary from Marian Alice Krussman to the plaintiff Harry E. Krussman, (sometimes known as H. E. Krussman) and that the plaintiff herein is the real party in interest and that this action has been brought by the real party in interest.

3. That all overdue monthly payments of installments made by the insured to the defendant were made for the purpose of continuing the certificate in full force and effect, and none of the same were made and none of the same were made by the insured for the purpose of reinstatement. That the defendant at all times treated the insured as a member in good standing. That the acts and conduct of the defendant and its course of dealing with the insured, including the forwarding of letters enclosing refund checks for gains and savings apportionable to his certificate and informing him that he was a member in good standing, led the insured to believe and he did believe and understand as a reasonable man that prompt payment of installments would not be required but that they would be received, and accepted after they were due, and that insured would be considered in good standing and that he could make monthly payments of installments after the time specified in the contract of insurance, and avoid forfeiture or suspension, and that by [53] said acts, conduct and custom, the defendant waived prompt payment and strict performance of the provisions of its certificate and its constitution laws



and by-laws, and the said defendant is now estopped from invoking the forfeiture of said contract for failure to make prompt payment.

4. That Section 40-2331 I. C. A., providing that the constitution and laws of a society (such as the defendant) may provide that no subordinate body or any of its subordinate officers and members shall have power or authority to waive any of the provisions of the laws and constitution of the society, does not prevent the society itself from waiving the provisions of its constitution and laws, nor does said section authorize or empower the society to change the rules of agency.

5. That Bazil Fleming was the agent of the defendant and it is presumed that he performed his duties and communicated to the defendant his knowledge of Krussman's ill health which he as agent acquired within the scope of his powers and duties, and that if he failed to advise his principal of such illness, the knowledge of such illness on the part of the financial secretary which he acquired while acting as agent of the defendant would be imputed to the defendant.

6. That the defendant has power and authority to waive the provisions of its constitution, laws and by-laws.

7. That the said certificate of insurance was not forfeited and that insured was a member in good standing of the defendant company at the time of his death.

8. That the plaintiff is entitled to judgment

against the defendant for the sum of \$5,000 together with interest thereon from the 8th day of August, 1940, at the rate of 6% per annum, and costs. Let judgment be entered accordingly.

Dated this 23rd day of December, 1941.

CHARLES C. CAVANAH,  
United States District Judge.

[54]

Service is hereby accepted and acknowledged of the proposed Findings of Fact and Conclusions of Law and judgment by receipt of the foregoing copies thereof this 11th day of December, 1941.

A. L. MERRILL,  
R. D. MERRILL,  
RAINEY T. WELLS,  
Attorneys for Defendant.

[Endorsed]: Filed Dec. 23, 1941. [55]

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In the District Court of the United States, for the  
District of Idaho, Eastern Division.

HARRY E. KRUSSMAN, as Trustee of an  
Express Trust, Plaintiff,

vs.

OMAHA WOODMEN LIFE INSURANCE  
SOCIETY, a corporation, Defendant.

JUDGMENT

This cause came on to be heard on October 22, 1941, at Pocatello, Idaho, before the Court without

the intervention of a jury. As the conclusion of the trial and presentation of oral argument the Court reserved decision and took the case under advisement. Subsequent thereto briefs were filed on behalf of the respective parties, and the Court having made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed That the plaintiff, Harry E. Krussman, as Trustee of an Express Trust, do have and recover judgment against the defendant, Omaha Woodmen Life Insurance Society, a corporation, in the sum of \$5,000.00, together with interest thereon at the rate of six per cent per annum from the 8th day of August, 1941, until paid, and plaintiffs costs taxed at \$29.60.

Signed and entered this 23rd day of December, 1941.

CHARLES C. CAVANAH,  
United States District Judge.

[Endorsed]: Filed December 23, 1941. [56]

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[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS, CONCLUSIONS  
OF LAW, AND JUDGMENT, AND MOTION  
TO STRIKE, AMEND AND SUBSTITUTE.

Comes now the defendant and objects generally and specifically to the Findings of Fact and the Conclusions of Law drawn therefrom, and moves the Court to amend said Findings, make additional



Findings, and different Conclusions, and enter judgment in favor of the defendant.

Without waiving any right whatsoever that may be possessed by the defendant in respect to challenging any Finding or Conclusion, but expressly reserving to itself all rights under the Rules of Civil Procedure and under the law, the defendant submits the following specific objections and motions, to-wit:

### I.

Defendant moves to strike from Finding No. 1 the following: "That the defendant qualified to do business in the State of Idaho as a foreign corporation, doing business of insuring the lives of its members" and to insert in lieu thereof the following: "That the defendant qualified under the laws of the State of Idaho as a fraternal benefit society and insured the lives of some of its members as part of its fraternal functions."

### II.

The defendant objects to and moves to strike from Finding [57] No. II the recitation that Eric A. Krussman "remained such member in good standing and entitled to all of the privileges and benefits appurtenant to said membership until his death, which occurred on August 2, 1940," and also that recitation touching the benefit certificate, as follows: "which said certificate of insurance was in full force and effect at the time of his death," upon the ground and for the reason that in each instance



said Finding is not supported by any competent evidence, but on the contrary the undisputed evidence is that the said Eric A. Krussman was suspended from membership for failure to pay during the month of June, 1938, the installment which became due that month and his certificate became void and was never thereafter reinstated.

### III.

The defendant objects to Finding No. IV upon the ground that it is not a Finding of an ultimate fact and is not in accordance with the provisions of the Constitution, Laws and By-Laws of the defendant, and is contrary to the evidence introduced, more particularly in that the said Eric A. Krussman became suspended as a member of the Society of the defendant by reason of failure to pay, and his Certificate thereupon became void and was never thereafter reinstated.

### IV.

Defendant objects to and moves to strike the last full sentence of Finding No. V, beginning with the words "That Basil Fleming, the financial secretary of the defendant, was in the habit of calling at the residence of the insured for collection of checks," and ending with said paragraph, upon the ground that the matters therein recited are immaterial under the issues in this case, and that such information, [58] if any, as Basil Fleming may have acquired was not imputed to the defendant, and

that the delinquent payments tendered were necessarily accepted under the terms of the contract and not otherwise.

#### V.

The defendant objects to and moves to strike all of Finding No. VI, which deals with certain form letters dated February 25, 1939, and February 1, 1940, and the various conclusions attempted to be drawn therefrom upon the ground and for the reason that the matters stated in said Findings are immaterial for any purpose and do not constitute any reason for judgment in favor of the plaintiff, particularly because there is no evidence showing or tending to show that the officer of the company who signed and forwarded said letters, or any other officer of the defendant having authority to bind said defendant, knew said certificate was void or had any knowledge of any kind or character at the time of sending said letters and refunds, that said Eric A. Krussman was not in good health or that he had not been and could not have been reinstated by reason of ill health.

#### VI.

The defendant objects to and moves to strike from said Findings all of Paragraph Numbered VII. reading as follows:

“The Court finds that there is no evidence in the record that any notice or warning of any kind was ever given to the insured that his Certificate was not in full force and effect.”

for the reason that the same is not within the issues of said cause and is immaterial for any purpose and, if true, would not constitute any reason for judgment in favor of the plaintiff, more particularly because the contract with the member [59] did not require notice of suspension but pursuant to Section 63 of the Constitution, Laws and By-Laws, suspension is automatic and self-operative and the member is charged with knowledge of such provisions.

## VII.

Defendant objects to and moves to strike from Finding No. XVII the following:

“but finds that the insured was not suspended, nor was his certificate null and void,”

and also that portion of said Finding reading as follows:

“and the proceeds applied for the June, 1938 installment; that the same was received and accepted by the defendant for the purpose of continuing in force the insurance certificate (Exhibit 2), and the Court finds that it is not true that after June, 1938, every or any of the payments made by the insured and received by the defendant were made after the Certificate terminated and became void, and the member suspended,”

for the reason that said matters so sought to be stricken are not supported by the evidence nor in harmony therewith. In this respect defendant moves



said Finding be amended by substituting in lieu of the last quoted provisions, the following:

“and the proceeds were retained by defendant pursuant to the terms of said contract for the purpose of again making the said Eric A. Krussman a member, if he was at said time in good health and remained in good health for a period of 30 days thereafter, and each and every payment made by the insured after June, 1938, was made for the purpose of reinstatement and accepted and retained by the defendant pursuant to Sections 63 (b), 65 and 66 (a) and (b) of the Constitution, Laws and By-Laws.”

#### VIII.

The defendant objects to and moves to strike from Finding No. XVIII the following: [60]

“That Basil Fleming, the Financial Secretary, agent of the defendant, had actual knowledge of Krussman’s condition from about the date of insured’s death. \* \* \* That the said Basil Fleming was the agent of the defendant and acquired knowledge of Krussman’s condition while he was acting within the scope of his powers and duties, and it is presumed that he performed his duty as required by the above quoted sections, and that such knowledge was communicated to the defendant, and if not, would be imputed to the defendant,”

upon the ground and for the reason that said statements are contrary to the terms and conditions of



the contract, and particularly Sections 65, 66, 82 (a) and 109 (g), of the Constitution, Laws and By-Laws, and upon the further ground that said purported Finding is against the law.

Defendant further objects to and moves to strike from said Finding No. XVIII that portion thereof beginning with the words "That Section 105 (a) and (b)," and ending with the quotation from Section 109 of the Constitution, Laws and By-Laws with the words "upon blanks furnished for that purpose," for the reason that the same is wholly immaterial and surplusage.

#### IX.

Defendant objects to and moves to strike all of Finding No. XIX upon the ground and for the reason that the same is not supported by the evidence, but is contrary thereto and to the provisions of the contract, more particularly in that the payment of delinquent installments and their acceptance by the defendant was for purposes of reinstatement as provided in sections of the Constitution, Laws and By-Laws numbered 65, 66 (a) and (b) and such acceptance did not and could not have constituted a waiver of any rights under the contract, but the payment thereof did constitute a warranty of good health. [61]

#### X.

Defendant objects to and moves to strike Finding No. XX upon the ground and for the reason that the same is not supported by the evidence,

but is contrary thereto and is against the law and fails to recognize the provisions of the contract respecting the warranty of good health and the necessity on the part of the defendant to accept tendered payments by one in default, which payments come with the warranty of good health which warranty in this case was false.

### XI.

The defendant objects to and moves to strike all of Finding No. XXI upon the ground and for the reason that the same is not supported by the evidence, but is contrary thereto, and more particularly in that it is contrary to the provisions of the contract as expressed in Sections 65, 66, 82, 109 (g) of the Constitution, Laws and By-Laws.

### XII.

Defendant objects to and moves to strike from Finding No. XXII the following: "that the sum of \$5,000 is now due thereon from the defendant to the plaintiff, together with interest thereon at the rate of 6% per annum from the 8th day of August, 1940, and costs of this action," upon the ground and for the reason that the same does not constitute a Finding of Fact and is an erroneous conclusion and is not supported by the evidence in said cause, but is contrary thereto.

### XIII.

Defendant objects to and moves to strike the Conclusions of Law Numbered 1 to 8 inclusive,

upon the ground and for the reason that they are not supported by the evidence and the facts proved thereby, but are contrary thereto and against the law. Defendant further moves that Conclusions of Law be made [62] and entered in conformance with the testimony adduced resolving the controversy in favor of the defendant and against the plaintiff.

#### XIV.

Defendant moves the court to make and enter the following additional Findings of Fact, to-wit:

##### Defendant's Requested Finding No. I.

That the said Eric A. Krussman did not pay the installment due for the month of June, 1938, during the month for which it became due and thereby became suspended as a member and the beneficiary certificate referred to herein became and was void and the contract between the defendant and Eric A. Krussman was terminated; that the payment tendered by check, dated July 19, 1938, for the said June installment was accepted by the defendant pursuant to the Constitution, Laws and By-Laws of said society for the purpose of reinstatement under the conditions recited in said contract and the tender of said payment on behalf of the said Eric A. Krussman was a warrant that he, at the time thereof, was in good health and that he would remain in good health for thirty days after the attempt to become thus reinstated. That said warranty failed and the tender was rendered ineffective for



reinstatement because the said Eric A. Krussman did not remain in good health for a period of thirty days thereafter, but on the contrary, on the 22nd day of June, 1938, he suffered a paralytic stroke which rendered him helpless for a period of several months and he was never again in good health from the 22nd day of July, 1938, until the date of his death on August 2, 1940, and was at no time during said period of time in a condition of health that would have permitted him to have fulfilled any warranty of good health or permit the reinstatement of said certificate. That each month thereafter, up to and including the date of his death, each installment tendered the defendant by or on behalf of Eric A. Krussman was a delinquent installment for the preceding month and that each installment was accepted by the company pursuant to the Constitution, Laws and By-Laws, and particularly Sections 65 and 66, and that in each instance the warranty accompanying said tender was false, and the acceptance of said installments did not constitute a reinstatement, but said certificate remained void and of no force or effect and the said Eric A. Krussman was during all of said time suspended, and said certificate void and was void on the date of his death. [63]

Defendant's Requested Finding No. II.

That there was no requirement on the part of the defendant to give Notice of Suspension



to Eric A. Krussman, but that the suspension was automatic and self-operative upon the failure to pay the installment for the month within which it became due; that the said Eric A. Krussman was charged with knowledge of all of the terms and conditions of said contract, including the Constitution, Laws and By-Laws and knew or should have known that no notice of suspension was required, but that he was suspended and his certificate terminated by reason of his failure to make said payments during the month for which the same became due.

Defendant's Requested Finding No. III.

That from the date the said Eric A. Krussman became ill until after his death, neither the secretary nor any officer of the defendant had any knowledge whatever that the said Eric A. Krussman was not in good health, but on the contrary assumed and had a right to assume that he was in good health and all delinquent installments were tendered and received pursuant to the terms of the contract and not otherwise, and the Secretary and all other officers of said defendant relied and had a right to rely upon the warranty of good health.

Defendant's Requested Finding No. IV.

That under the Constitution, Laws and By-Laws the defendant was required to accept the tender of past due installments made by one

to whom a certificate had theretofore been issued, if made within ninety days from date of suspension, but that the acceptance and retention of said delinquent installments did not constitute a waiver of the right to insist that the member be in good health and remain in good health for a period of thirty days thereafter, and the acceptance and retention of said installments in this case did not constitute an estoppel or waiver of the defendant to rely upon the suspension of said member by the non-payment of said installments when the warranty made by the payment of said installment was false, and the member was not in good health. [64]

Defendant's Requested Finding No. V.

That the Financial Secretary, Basil A. Fleming, did not and could not waive any of the provisions of the Constitution, Laws and By-Laws and any information which he may have obtained touching the health of Eric A. Krussman, if any, was not imputed to the defendant and did not and could not constitute a waiver of any of the provisions of said contract, nor prevent any certificate from becoming void for non-payment of current installments.

Defendant's Requested Finding No. VI.

That the defendant did not at any time, nor in any manner, waive any of the provisions of its contract and was at all times entitled to in-

sist upon punctual payment of all installments and entitled to rely upon the warranty of good health which the tender of a delinquent installment presented.

Defendant's Requested Finding No. VII.

That the defendant has tendered to the plaintiff herein the total sum of \$294.08, which said sum constitutes all of the delinquent installments paid to the defendant after the said Eric A. Krussman became suspended and in ill health; that said tender was refused by the plaintiff and has been kept good by the defendant.

The defendant further moves the Court that appropriate Conclusions of Law, based upon the foregoing proposed Findings, be duly made and entered herein, wherein it be concluded that the Certificate originally issued to Eric A. Krussman became and was void on the date of his death, and the plaintiff is not entitled to recover a judgment against the defendant herein and that the defendant recover its costs expended. [65]

Defendant objects to judgment being entered against it and moves that judgment be rendered in

its favor pursuant to said Findings and Conclusions.

Dated December 20, 1941.

A. L. MERRILL

R. D. MERRILL

Residing at: Pocatello, Idaho

RAINEY T. WELLS

(ALM)

Residing at: Omaha, Nebraska

Attorneys for Defendant

The foregoing objections to the Findings and Conclusions of Law and Judgment are overruled. Exception allowed.

Dec. 23rd, 1941.

CHARLES C. CAVANAH

District Judge

Service of foregoing by receipt of copy acknowledged this 20th day of December, 1941.

T. D. JONES

RALPH H. JONES

Residing at: Pocatello, Idaho

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 22, 1941. [66]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Omaha Woodmen Life Insurance Society, a corporation, the above



named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled Court and Cause on the 23rd day of December, 1941, which said Judgment was in favor of plaintiff above named and against the defendant.

Dated this 30th day of January, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residing at Omaha, Nebraska

[Endorsed] Filed January 31, 1942. [67]

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[Title of District Court and Cause.]

### COST BOND ON APPEAL

Know All Men by These Presents:

That we, Omaha Woodmen Life Insurance Society, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound to Harry E. Krussman, as Trustee of an Express Trust, the

plaintiff and appellee in the above cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our Successors and Assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, 1942.

Whereas, on the 23rd day of December, 1941, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit depending in that Court wherein Harry E. Krussman, as Trustee of an Express Trust, was plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Five Thousand (\$5,000.00) Dollars, with interest and costs, and said defendant having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States [68] Circuit Court of Appeals for the Ninth Circuit:

Now, the condition of this obligation is such, that if the said Omaha Woodmen Life Insurance Society, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Judgment

be modified, then the above obligation is void, otherwise to remain in full force and effect.

OMAHA WOODMEN LIFE  
INSURANCE SOCIETY

By A. L. MERRILL

One of the Attorneys of  
Record

Residing at Pocatello, Idaho,  
Principal

(Seal)

UNITED STATES FIDELITY  
AND GUARANTY COMPANY

By E. P. CARR

Its Attorney in Fact

Surety

T. F. TERRELL

Resident Agent

[Endorsed]: Filed Jan. 31, 1942. [69]

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[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPER-  
SEDEAS AND STAY ON APPEAL

Comes now the Omaha Woodmen Life Insurance Society, a corporation, the above named defendant and appellant, and represents as follows:

That Judgment was entered in the above entitled Court and cause on the 23rd day of December, 1941, in favor of Harry E. Krussman, as Trustee of an Express Trust, the above named plaintiff, and

against the Omaha Woodmen Life Insurance Society, a corporation, defendant, for the sum of Five Thousand (\$5,000.00) Dollars, with interest thereon at 6% per annum from the 8th day of August, 1941, and costs taxed at Twenty-nine and 60/100 (\$29.60) Dollars; that said defendant has appealed from said Judgment to the United States Circuit Court for the Ninth Circuit, and desires the Court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve the United States Fidelity and Guaranty Company, a corporation, as Surety, and thereupon order a Stay of Proceedings according to law.

Now, therefore, Petitioner prays that the Court fix [70] the amount of said Supersedeas Bond, approve the form of Bond tendered herewith, and the Surety thereon and order a Stay according to law.

Dated this 30th day of January, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residing at Omaha, Nebraska

[Endorsed]: Filed Jan. 31, 1942. [71]



[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING  
STAY OF EXECUTION

The defendant, Omaha Woodmen Life Insurance Society, a corporation, having this day filed its Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiff, Harry E. Krussman as Trustee of an Express Trust, and against the defendant, Omaha Woodmen Life Insurance Society, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an Order fixing the amount of a Supersedeas Bond and approving the proposed Surety and the form of said bond and granting said Stay of Proceedings:

Now, therefore, it is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Six Thousand (\$6,000.00) Dollars, and the Bond tendered by the said Omaha Woodmen Life Insurance Society, a corporation, in said sum with the United States Fidelity and Guaranty Company, a corporation, as Surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed January 31, 1942. [72]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Omaha Woodmen Life Insurance Society, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho as Surety, are held and firmly bound unto Harry E. Krussman, as Trustee of an Express Trust, the above named plaintiff and Appellee, in the full and just sum of Six Thousand (\$6,000.00) Dollars cash, lawful money of the United States of America, to be paid to the said Harry E. Krussman, as Trustee of an Express Trust, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord Nineteen Hundred and Forty-two.

Whereas, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit depending in said Court, between Harry E. Krussman as Trustee of an Express Trust, as plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, as defendant, a Judgment was rendered against the said defendant, which Judg-

ment was entered in said Court on the 23rd day of December, 1941, for the sum of Five Thousand [73] (\$5,000.00) Dollars, with interest thereon at six percent (6%) per annum from August 8, 1941, and costs aggregating Twenty-nine and 60/100 (\$29.60) Dollars, and said Omaha Woodmen Life Insurance Society, a corporation, having filed in said Court a Notice of Appeal to reverse said Judgment in the aforesaid suit, on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California:

Now, the condition of the above obligation is such, that if the said Omaha Woodmen Life Insurance Society shall prosecute said Appeal to effect, and satisfy the said Judgment in full, together with costs, interest and damages for delay, if for any reason the Appeal is dismissed, or if Judgment is affirmed, and to satisfy in full such modification of the Judgment and such costs, interest and damages as the Appellate Court may adjudge and award, if said Appellant fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OMAHA WOODMEN LIFE  
INSURANCE SOCIETY

By A. L. MERRILL

One of its Attorneys of Record  
Residing at Pocatello, Idaho  
Principal



UNITED STATES FIDELITY  
AND GUARANTY COMPANY

By E. P. CARR

Its Attorney in Fact

Surety

(Seal)

T. F. TERRELL

Resident Agent

The foregoing Bond is approved as to sufficiency, form and Surety, and is allowed as a Supersedeas this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge [74]

Power of Attorney

No. 56099

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint E. P. Carr of the City of Pocatello, County of Bannock, and State of Idaho, to be its true and lawful attorney in and for the County of Bannock in the State of Idaho, for the following purposes, to wit:

To sign its name as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding brought or pending within the aforesaid County of the said



State, or in any judicial action or proceedings over which a United States Court shall exercise jurisdiction.

It being the intention of this Power of Attorney to fully authorize and empower the said E. P. Carr to sign the name of said Company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said Company with the seal of the said Company thereto affixed, and the said Company hereby ratifies and confirms all and whatsoever the said E. P. Carr may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company, pursuant to a resolution of its Board of Directors, duly passed on the 11th day of January, A. D. 1904, (a certified copy of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal, duly attested by its Vice-President and by its Assistant Secretary this 12th day of February, A. D. 1940.

UNITED STATES FIDELITY  
AND GUARANTY COMPANY

[Seal] By M. BARRATT WALKER

Vice-President.

J. E. GITTINGS

Assistant Secretary [75]

State of Maryland,  
City of Baltimore—ss.

On this 12th day of February, A. D. 1940, before me appears M. Barratt Walker, Vice-President of the United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquainted, who, being by me duly sworn, says that he is the Vice-President of the United States Fidelity and Guaranty Company; that he knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that he signed said instrument as Vice-President of said Company by like authority. The said M. Barratt Walker further says that he is acquainted with J. E. Gittings and knows him to be the Assistant Secretary of the United States Fidelity and Guaranty Company; that the signature of the said J. E. Gittings subscribed to said instrument, is the genuine handwriting of said J. E. Gittings, and was thereto subscribed by like order of the Board of Directors.

My Commission expires the first Monday in May, A. D. 1941.

(Signed) DOROTHY S. DREXEL

Notary Public

[Seal]

## Copy of Resolution

That Whereas, it is often necessary in order to facilitate the business of the Company in States other than Maryland, and in the Territories and in Provinces of the Dominion of Canada and in the Colony of Newfoundland, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness.

Now, Therefore, Be It Resolved, that the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries be, and they are hereby authorized to appoint one or more persons residing in the States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to sign the name of the Company as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding within any one of the said States or Territories, or Provinces of Canada, or Colony of Newfoundland, and that the said person [76] or persons so appointed are hereby authorized and empowered to sign the name of the Company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the Company to all intents and purposes, as if done by its duly authorized



officers, and the Company through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, W. E. Moore, an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to E. P. Carr of Pocatello, Idaho, authorizing and empowering him to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said power of attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of January, 1904, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company this 4th day of November, 1940.

[Seal]

W. O. MOORE

Assistant Secretary

[Endorsed]: Filed Jan. 31, 1942. [77]



[Title of District Court and Cause.]

### REPORTER'S TRANSCRIPT

This matter came on for hearing at Pocatello, Idaho, on October 23, 1941, before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury.

#### Appearances.

Messrs. Jones, Pomeroy & Jones, Pocatello, Idaho  
Attorneys for the plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attor-  
neys for the Defendant. [78]

October 23, 1941

(Statement of case made by counsel)

Mr. Jones: We have the deposition of V. J. Pakes and I will state that it was agreed by counsel that either party may read any portion of the deposition they wish. There was a stipulation entered into for the taking of the deposition.

Mr. Merrill: We stipulated to take the deposition.

Mr. Jones: This is entitled, In the District Court of the United States, for the District of Idaho, Eastern Division. Harry E. Krussman, as Trustee of an express trust, plaintiff. vs. Omaha Woodmen Life Insurance Society A corporation Defendant. The deposition of V. J. Pakes, Assistant Secretary of the defendant of Omaha, Nebraska, was taken before me a Notary Public, in and for the County

of Douglas, State of Nebraska, on the 21st day of August 1941, at my office on the fourth floor, Insurance Building, Omaha, Nebraska, pursuant to the annexed stipulation on behalf of the plaintiff and defendant in the above entitled action pending in the above entitled Court. T. D. Jones, of Pocatello Idaho, appeared as Attorney for the plaintiff, and George Yeager, Assistant to the General Attorney for Defendant, of Omaha, Nebraska, appeared as attorney for the defendant. [80]

The following deposition was read, as follows: the questions read by Mr. T. D. Jones, answers by Mr. Ralph H. Jones.

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V. J. PAKES

Being by me first duly sworn to tell the whole truth as hereinafter certified, testified as follows:

Direct Examination

Q. Mr. Pakes will you state your name, age, occupation?

A. V. J. Pakes, 68; I am assistant secretary of the Omaha Woodmen Life Insurance Society?

Q. Mr. Pakes what are your duties as Assistant Secretary of the defendant society?

A. Corresponding, accounting officer and custodian of all records.

Q. If you know, did Eric A. Krussman of Pocatello, Idaho, make application for membership in the society?           A. He did.

(Deposition of V. J. Pakes.)

Q. Do you have that application in your records of the society?      A. We have.

Q. Mr. Pakes, I hand you what purports to be an application of Mr. Krussman, and ask if it is his application for membership, marked Exhibit 1.

Mr. Jones: I wish to have this marked as exhibit "1" at this time. [81]

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### PLAINTIFF'S EXHIBIT 1.

#### "PACIFIC WOODMEN LIFE ASSOCIATION PHYSICIAN'S REPORT ON EXAMINATION

\*            \*            \*            \*            \*            \*

"1. Name and residence of applicant: Eric A. Krussman, Pocatella" \* \* \*

#### APPLICATION FOR MEMBERSHIP IN PACIFIC WOODMEN LIFE ASSOCIATION

\*            \*            \*            \*            \*            \*

I hereby certify, agree and warrant that I am of sound bodily health and mind; that I am temperate in habits and have no injury or disease that will tend to shorten my life. I hereby consent and agree that this application, consisting of two pages, to each of which I have attached my signature, and all the provisions of the Constitution, Laws and By-Laws of the As-

(Deposition of V. J. Pakes.)

sociation now in force or that may hereafter be adopted, shall constitute the basis for and form a part of any Beneficiary Certificate that may be issued to me by the Sovereign Camp of the Pacific Woodmen Life Association, whether printed or referred to therein or not.

I hereby waive the attaching of copies thereof to said Certificate; and I further waive the provisions of all statutory laws and court decisions in relation thereto; and I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure. \* \* \*

(Signed) ERIC A. KRUSSMAN,

Applicant

Postoffice Address

Pocatello, Idaho." [213]

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A. Yes, it is his application for membership.

Mr. Jones: At this point defendant's exhibit marked number 1 was offered. We offer it at this time.



(Deposition of V. J. Pakes.)

Mr. Merrill: If Mr. Jones is using the deposition, and the exhibits they go in as exhibits for the plaintiff and not as defendant's exhibits.

Mr. Jones: Very well, we will offer the exhibit.

The Court: Yes, the defendant is not putting on their case at this time.

Mr. Merrill: Then it is understood that they are the plaintiff's exhibits.

The Court: He offers them as his exhibit.

Mr. Merrill: Well, let's not have any misunderstanding as to the exhibits.

The Court: It is a part of their case. They may be admitted as their exhibit. Plaintiff's exhibit.

Q. Was there a benefit certificate issued to Mr. Krussman?

A. There was a benefit certificate issued to Mr. Krussman.

Q. Mr. Pakes, I hand you a benefit certificate marked exhibit "2" and ask if it is the certificate issued to Mr. Krussman?

A. Yes, it is the certificate issued to Eric A. Krussman [82] No. T E 1321001, for \$5,000.00 under date of September 30, 1935.

Q. You are familiar with the signature of D. E. Bradshaw and John T. Yates, former Secretary of the Pacific Woodmen Life Association?

A. I am.

(Deposition of V. J. Pakes.)

Q. Are the signatures appearing on this certificate the true signatures of Mr. D. W. Bradshaw and Mr. John T. Yates?

A. They are the true signatures of Mr. Bradshaw and Mr. Yates.

Mr. Jones: We offer that certificate. It says in the deposition "Defendant offers in evidence exhibit "2" being the benefit certificate No. T E 1321001 issued to Eric A. Krussman on September 30, 1935.

Mr. Merrill: I move that be stricken, the statement that the defendant offers the exhibit.

The Court: It doesn't make any difference how it is designated in the deposition, the plaintiff is offering its proof at this time, this is the plaintiff's exhibit.

Mr. Jones: Yes, we offer it as our exhibit.

The Court: It will be treated as your proof, and it doesn't make any difference what the procedure was at the taking of the deposition. You are putting your proof in now. [83]

Mr. Merrill: Just so we understand it.

The Court: Plaintiff's exhibit "2" is admitted.

[Printer's Note]: Plaintiff's Exhibit 2 is here omitted as it is set forth at pages 3 to 9 of this printed transcript of record.

Q. Mr. Pakes, I observe from this certificate that the name of the Society is designated Pacific

(Deposition of V. J. Pakes.)

Woodmen Life Association. Has the name of the society been changed since that certificate was issued?

A. Yes, the name has been changed. I believe the date of change of name was September 1, 1937, and the new name is Omaha Woodmen Life Insurance Society.

Q. Has there been any change in the character of the Society along with the change of name?

A. There was no change in the character of the society.

Q. Will you please state what is the character of the society, what type of society is the defendant?

A. The Omaha Woodmen Life Insurance Society is a fraternal benefit society organized under the laws of Nebraska having a lodge system, ritualistic form of work, representative form of government, and conducted solely for the mutual benefit of its members, and not for profit.

Q. Does the Society have a constitution, laws and by-laws, and did it have such constitution, laws and by-laws at the time the certificate was issued to Mr. Krussman?

A. It has now, and did at the time of issuance of the certificate to Mr. Krussman.

Q. I hand you what purports to be a true printed copy of [84] the constitution, laws and by-laws of 1935, which became effective September 1,



(Deposition of V. J. Pakes.)

1935, marked Exhibit 3. Will you please state if that is such copy, and if it was in force at the time the certificate referred to was issued?

Mr. Jones: We ask that this be marked as exhibit "3".

Portions of Plaintiff's Exhibit No. 3, Being Constitution, Laws and By-Laws of The Pacific Woodmen Life Association, July 1935.

Sec. 63 (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Association, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Association, every member of this Association shall pay to the Financial Secretary of his Camp one annual assessment in advance each year, or one monthly installment of assessment each month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such



(Deposition of V. J. Pakes.)

person and the Association shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Association as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended because of the non-payment of any installment of assessment, if in good health, may within three calendar months from the date of his suspension again become a member of the Association by the payment of the current installment of assessment and all installments of assessments which should have been paid to maintain him as a member. Whenever installments of assessments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant [215] that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for non-payment of assessments shall be received and retained

(Deposition of V. J. Pakes.)

without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and the retention of payment of such installments of assessments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66. (a) The retention by the Association of any installment of assessment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, or an estoppel upon the Association.

(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment of assessment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 82. (a) No officer, employee or agent

(Deposition of V. J. Pakes.)

of the Sovereign Camp, or of any Camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of Camps—with or without the knowledge of any officer of the Association——have the effect of so changing, modifying, waiving or foregoing such laws or requirements. [216] Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Association constitute a waiver of the provisions of these laws by the Association or an estoppel of this Association.

(b) The Constitution and Laws of the Association now in force, or which may hereafter be enacted, the application and beneficiary certificate of membership shall constitute the contract between this Association and the member.

Sec. 105. (a) The President and Secretary of the Association shall appoint and may remove at will a Financial Secretary for each Camp, who shall be paid at least the same compensation per member per month by the Camp as has heretofore been paid to the Clerk by the local Camp.



(Deposition of V. J. Pakes.)

(b) The Financial Secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the Camp dues and the Sovereign Camp fund assessments and monthly installments thereof, and shall monthly pay the Camp dues so collected to the Banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the Sovereign Camp to the Secretary of the Association at the headquarters of the Association as provided for in Section 111, and shall give a good and sufficient bond in an indemnity association or company for the faithful performance of his duties in such sum as the President shall direct, the premium for such bond to be paid by the Sovereign Camp.

Sec. 109. (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and [217] By-Laws of this Association nor to bind the Sovereign Camp by any such acts.

Sec. 111. On or before the fifth day of every month the Financial Secretary of each Camp shall remit all the Sovereign Camp funds in his hands and all other funds due the Sovereign



(Deposition of V. J. Pakes.)

Camp to the Secretary of the Association. Such amounts shall be remitted in money order, certified check, bank cashier's check, or bank draft with exchange, payable to the order of the Treasurer. Accompanying such remittances, the Financial Secretary shall also forward such detailed statement of the standing of the members in the Camp as shall be required for the information of the Secretary of the Association, upon blanks furnished for that purpose.

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A. Yes, this is a copy of the constitution, laws and by-laws as amended and adopted at the session held in New York, July 1935, in effect September 1, 1935.

Q. Mr. Pakes, I hand you exhibit "4" and ask you if that is a true copy of the Constitution, laws and by-laws of the society which became effective September 1, 1937?

Mr. Jones: I ask that it be marked as exhibit 4.

(Deposition of V. J. Pakes.)

Portions of PLAINTIFF'S EXHIBIT No. 4,  
Being Constitution, Laws and By-Laws of  
the Omaha Woodmen Life Insurance So-  
ciety, June, 1937.

Sec. 63. (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Society, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Society, every member of this Society shall make to the Financial Secretary of his Camp one annual payment in advance each year, or one monthly installment thereof, on or before the first day of each calendar month, as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Society as his liquidated proportionate part of the cost of doing business and the cost of the pro-

(Deposition of V. J. Pakes.)

tection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter.

Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making [219] him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this Section or of these laws until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Pro-



(Deposition of V. J. Pakes.)

vided, that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66. (a) The retention by the Society of any installment paid by or for any person after he has become suspended in order to again make him a member, shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws or an estoppel upon the Society.

(b) Any attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any unpaid installment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 82. (a) No officer, employee or agent of the Society or the Sovereign Camp, Head Camp or of any Camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor shall any custom on the part of any Camp or any number of [220] Camps—with or without the



(Deposition of V. J. Pakes.)

knowledge of any officer of the Society—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Society constitute a waiver of the provisions of these laws by the Society or an estoppel of this Society.

(b) The Constitution and Laws of the Society now in force, or which may hereafter be enacted, the application and beneficiary certificate of membership shall constitute the contract between this Society and the member.

Sec. 109. (g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such act. [221]

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A. Exhibit 4 is the constitution, laws and by-laws of the Omaha Woodmen Life Insurance Society as amended at the session at Los Angeles, California, June, 1937, and in effect September 1, 1937.

(Deposition of V. J. Pakes.)

Q. To what date did those by-laws remain in force without amendment?

A. Exhibit 4 remained in effect until September 1, 1939.

Q. Were the Constitution, laws and by-laws again amended in 1939?

A. Yes, they were amended in 1939.

Q. I hand you a pamphlet marked Exhibit 5, and ask you if that was the constitution, laws and by-laws as amended in 1939 [85] and also how long it remained in effect?

Mr. Jones: I ask that be marked as exhibit 5.

Portions of Plaintiff's Exhibit No. 5, Being  
Constitution, Laws and By-Laws of the  
Omaha Woodmen Life Insurance Society,  
June, 1939.

Sec. 63. (a) In order to accumulate and maintain funds for the payment of the benefits stipulated in beneficiary certificates held by the members of this Society, as and when such benefits accrue, to maintain the reserves thereon and to provide for the payment of the expenses of the Society, every member of this Society shall make to the Financial Secretary of his Camp one annual payment in advance each year, or one monthly installment thereof, on or before the first day of each calendar month,

(Deposition of V. J. Pakes.)

as required by these laws or by the provisions of his beneficiary certificate, which shall be credited to and known as the Sovereign Camp fund; and he shall also pay such Camp dues as may be required by the by-laws of his Camp.

(b) If he fails to make any such payment on or before the last day of the month it shall thereby become delinquent, he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Society as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said member from the delivery of his certificate to the date of his suspension; except as otherwise provided in his certificate or in Sections 77 and 79.

Sec. 65. Any person who has become suspended by his failure to pay any monthly installment may, if living, within fifteen days from the date of his suspension again become a member of the Society by the payment of the delinquent installment to the Financial Secretary of the Camp. After fifteen days and within three months from the date of his suspension he may again become a member of the Society by the payment of the delinquent installments,



(Deposition of V. J. Pakes.)

provided he is in good health at the time of such payment [222] and remains in good health for thirty days thereafter.

Whenever payments are made by a person who has been suspended for more than fifteen days, for the purpose of again becoming a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended by not making payments, as well as all subsequent payments by him made, shall be received and retained by the Society without waiving any of the provisions of this section, or of these laws, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or did not remain in good health for thirty days thereafter. Provided, that the receipt and retention of such payments, in case such person is not in good health, or does not remain in good health for thirty days thereafter, shall not make such person again a member of the Society, nor entitle him or his beneficiary or beneficiaries to any rights watever.



(Deposition of V. J. Pakes.)

Sec. 66. (a) The acceptance and retention by the Society of any payments made after such attempt to again become a member shall not constitute a waiver of any of the provisions of this Constitution, Laws and By-Laws, nor operate as an estoppel against the Society, until such time as the Secretary of the Society shall have received actual, not constructive or imputed, knowledge that the suspended person was not in fact in good health when he attempted to again become a member, or that he did not remain in good health for thirty days after the payment of the delinquent installments in an attempt to again become a member.

(b) Any attempt by a person suspended for more than fifteen days to again become a member shall not be effective for [223] that purpose unless such person be in fact in good health at the time and continue in good health for thirty days thereafter, and the payment of any such unpaid installment shall be a warranty that such person is at the time in good health and that if the warranty is not true the certificate shall be null and void.

Sec. 72. (a) Should a member desire to change the beneficiary or beneficiaries named in his certificate, he may do so by filing with the Secretary of the Society his written request, properly witnessed, giving the name or names

(Deposition of V. J. Pakes.)

of such new beneficiary or beneficiaries; or by delivering the same to the Financial Secretary of a Camp for transmission to the Secretary of the Society. The Secretary of the Society shall endorse the name or names of the new beneficiary or beneficiaries upon the certificate of the member; or he may issue a new certificate to him, subject to the same conditions as the one surrendered, containing the name or names of the newly designated beneficiary or beneficiaries. He shall keep a record of such change in his office. In case of the death of such member after the execution and delivery of the request for change to the Secretary of the Society or to the Financial Secretary of a Camp and before the change is executed by the Secretary of the Society, then and in that event the amount payable upon such certificate shall be paid to such newly designated beneficiary or beneficiaries according to the terms of such member's request.

(b) No change of beneficiary shall be allowed or be binding on this Society or any beneficiary which is not requested in writing as herein provided more than twenty-four hours before the death of said member.

Sec. 82. (a) No officer, employee or agent of the Society or the Sovereign Camp, Head Camp or of any Camp, has the power, right

(Deposition of V. J. Pakes.)

or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this Constitution or these Laws, nor [224] shall any custom or course of dealing on the part of any Financial Secretary or of any Camp or any number of Camps—with or without the knowledge of any officer of the Society—have the effect of so changing, modifying, waiving or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the Constitution and Laws, then in force or thereafter enacted, nor shall the knowledge or act of any officer or employee of this Society constitute a waiver of the provisions of these laws by the Society or an estoppel of this Society.

(b) The Articles of Incorporation, the Constitution, Laws and By-Laws of the Society, the application and medical examination, or declaration of insurability, if accepted in lieu of medical examination, signed by the applicant, and all amendments to each thereof, the benefit certificate, and any riders attached thereto or endorsements made thereon by the President or Secretary of the Society shall constitute the contract between the Society and the member.



(Deposition of V. J. Pakes.)

Sec. 107. (a) It shall be the duty of the Financial Secretary to have charge of the records of the Camp, attend to the correspondence, issue all warrants paying out Camp funds, and all miscellaneous matters pertaining to its welfare and perform such duties as may be required by the Camp. He shall deliver all Camp books and records to the Society's officers or to any representative of the Camp when requested so to do by any such officer or representative thereof. He shall also keep the minutes of the proceedings of every meeting of the Camp.

(g) The Financial Secretary shall not by acts, representations or waivers, nor shall the Camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society nor to bind the Society by any such acts.

(h) No Financial Secretary shall have any power or authority to make any agreement to call upon and collect from a member, or any other person, any monthly installment or installments, [225] or for any other time or manner of payment than that prescribed in Section 63(a) of this Constitution, Laws and By-Laws; and any such attempted or purported agreement on his part shall not be binding upon the Society. [226]



(Deposition of V. J. Pakes.)

A. Exhibit 5 is a copy of the constitution, laws and by-laws of the Omaha Woodmen Life Insurance Society as amended at the session in New York, New York, June, 1939, in effect September 1, 1939, which remains in effect until September 1, 1941.

Q. They are still in effect, are they not?

A. Yes.

Mr. Jones: At this point defendant offered in evidence exhibits 3, 4 and 5, and we now offer them in evidence.

The Court: They may be admitted.

Q. Mr. Pakes, what rate of assessment was Mr. Krussman required to pay on this certificate?

A. He was required to pay \$11.70, per month.

Mr. Jones: We will skip the next two questions.

Q. Did the society receive proofs of death of Mr. Krussman? A. It did.

Q. Do you recall about what date those proofs of death were received?

A. They were received on August 8, 1940.

Q. Mr. Pakes, I hand you statement of Camp officers, certificate of attending physician, statement of beneficiary, and death certificate which have been marked as exhibits 6, 7, 8 and 9, respectively, and ask you if those exhibits are [86] the proofs of death which were received by the defendant on August 8, 1940?

(Deposition of V. J. Pakes.)

Mr. Jones: We ask that these certificates be marked exhibits 6, 7, 8, and 9, just as they were marked at the time of the taking of the deposition.

A. Yes, they are the proofs of death received by the home office on August 8, 1940.

Q. Mr. Pakes, calling your attention to the lead pencil notation on the Statement of camp officers, exhibit 6, may I ask if that lead pencil notation was on the statement when it was received, or if that is an office notation made afterwards?

A. This notation was made by the office after the proofs had been received here, and indicates the amount of remittance received with the proofs.

Q. What action was taken on these proofs of death upon receipt of them?

A. They were referred to the Claim Department.

Q. If you know, was the claim for death benefit approved or rejected?

A. Claim was rejected.

Mr. Jones: Now, we omit the deposition down to the middle of page five where Mr. Yeager offered exhibits 6, 7, 8 and 9, and we offer them in evidence at this time. That is at the middle of page five of [87] the depositions.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 6.

PROOFS OF DEATH

Statement of Camp Officers

This blank is distributed to Camps in advance to expedite the making of proof of claim. The furnishing of same by a Camp or any officer thereof shall not be an acknowledgment of liability of the Society, nor shall such act constitute a waiver of any rights of the Society, nor create an estoppel of the Society.

We, the undersigned Consul Commander, Banker and Financial Secretary of Camp No. 7, located at Pocatello, County of Bannock, State of Idaho, hereby certify that Eric A. Krussman, a member of this Camp, who held certificate No. TE 1321001, died at Pocatello, Idaho, County of Bannock, State of Idaho, on the 2 day of August, 1940, and that the cause of his death is reported to us as cerebral hemorrhage.

The deceased held the office of none in this Camp.

The last two Monthly Installments paid to the Financial Secretary for the deceased were Installment No. 7-8, of the year 1940, amount \$23.70, paid on the 1st day of Aug. 1940, by ....., and Installment No....., of the year....., amount \$....., paid on the..... day of ....., 19....., by Bazil Fleming, Secty.

(Deposition of V. J. Pakes.)

Recd chk #871 [illegible] #7 & 8—Amt \$23.70 Cr. 30c to Camp (8/8/40)

Have above installments been forwarded to the Home Office?.....If not, remittance should accompany this statement.

The Camp records show that the deceased last became suspended on the first day of..... 19....., by the non-payment of Installment No. ...., for the month of....., 19....., and that his delinquent installments were paid on the.....day of....., 19....., by....., and that he last previously became suspended on the first day of ....., 19....., by the non-payment of Installment No....., for the month of....., 19....., and that his delinquent installments were paid on the..... day of....., 19....., by.....

We certify that the last occupation of the deceased, immediately prior to his death, was that of Hotel Manager, and that he had been engaged in such occupation for.....years. His previous occupation was.....for.....years.

The Benefit Certificate is payable to Harry E. Krussman and if this claim is allowed we believe the following named persons legally entitled to the benefits in the following amounts respectively:

Amount	Name	Relationship	Age	Postoffice Address
.....	Harry E. Krussman	Son	33	Twin Falls, Idaho
.....	Marian Krussman	Daughter	15	Pocatello, Idaho



(Deposition of V. J. Pakes.)

Signed at Pocatello, State of Idaho, this 6th  
day of August, 1940.

(Camp Seal)

.....  
Consul Commander.  
.....

Banker.

(Camp Seal) BAZIL FLEMING,  
Financial Secretary  
Cashier Dept. M. Aug. 8, 1940 [227]

PLAINTIFF'S EXHIBIT 7.

“Proofs of Death

Certificate of Attending Physician

\* \* \* \* \*

I, Fred M. Ray, M.D. hereby certify that I  
am a legal practitioner of medicine, that I  
graduated from Northwestern Medical College  
in the year 1909, and that I attended as a  
physician in the last illness of Eric Alfred  
Krussman of Pocatello, State of Idaho, that  
he died at Pocatello, State of Idaho, on the 2  
day of August, 1940 and that the statements  
and answers herein made by me are true to the  
best of my knowledge and are in my own hand-  
writing:

\* \* \* \* \*

(Deposition of V. J. Pakes.)

3. At last illness, how long was deceased sick? Two years.

4. When did deceased show first symptom of his final illness? August, 1938.

5. For how long a time was deceased confined to his house or prevented from attending to his business? Totally disabled (most of time) since August, 1938.

6. When, how long and for what did you treat deceased during his last illness? Cerebral hemorrhage (right side paralysis)

7. Date of your first visit or prescription. August, 1938.

8. Date of your last visit. August 2d, 1940.  
(Signed) FRED M. RAY, M.D." [228]

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PLAINTIFF'S EXHIBIT 8.

"Proof of Death

Statement of Beneficiary

\* \* \* \* \*

The undersigned states that Eric A. Krussman, who held Benefit Certificate No. P.E. 1321001 dated....., 1....., died at Pocatello, County of Bannock, State of Idaho, on the 2 day of August, 1940, the cause of his death being cerebral hemorrhage \* \* \* The deceased was taken sick with the trouble which caused his death on the.....day of August,

(Deposition of V. J. Pakes.)

1938, and the duration of his last illness was two years \* \* \* \*

(Signed) HARRY E. KRUSSMAN.

Witness: Basil Flemming." [229]

### PLAINTIFF'S EXHIBIT 9.

"Certificate of Death

State of Idaho

\* \* \* \* \*

3 (a) Full name—Eric Alfred Krussman.

\* \* \* \* \*

### MEDICAL CERTIFICATE OF DEATH

I hereby certify, that I attended deceased from August, 1938 to August 2, 1940 \* \* \* Immediate Cause of death: Due to H.B.P. and cerebral hemorrhage—two years ago. \* \* \* \*

(Signature) F. M. RAY, M.D.

8/3/1940" [230]

Mr. Jones: Then commencing on the next page, that would be page 6 of the deposition, the first question.

Q. Mr. Pakes, did Mr. Krussman pay his installment for the month of July 1939 during that month.

A. Mr. Krussman paid the July installment on August 29, 1939.

(Deposition of V. J. Pakes.)

Q. To whom was payment made?

A. Payment was made to Morris Sheppard, Treasurer of the society.

Q. To whom did Mr. Krussman make payment?

A. Mr. Krussman made payment to the financial secretary.

Mr. Jones: I asked the question at that point. "You mean delivered the check?"

A. Yes, delivered the check.

Mr. Jones: I will omit the next questions and answers down to the stipulation at the bottom of page 6,

It is understood and agreed between plaintiff, by his attorney T. D. Jones, and by defendant by George Yeager of counsel for defendant, that the deposition now being taken of Mr. Pakes may be read in evidence, or any part thereof by the plaintiff in the presentation of its case.

Mr. Yeager, said that was so understood.

Q. Mr. Pakes, I have in my hand a check dated August 24, 1939 [88] which was handed to me by Mr. Jones, and ask you if the payment of the July 1939, installment was made by means of that check marked Exhibit 12?

Mr. Jones: We ask that be marked exhibit 12.

A. Exhibit 12 is the check dated August 24,



(Deposition of V. J. Pakes.)

1939 payable to Morris Sheppard for \$11.85, and received at this office on August 28, 1939, and deposited at the Omaha National Bank on August 31, 1939.

Mr. Jones: Defendant offered in evidence exhibit 12, and we offer the exhibit now as exhibit 12.

The Court: Admitted.

Q. Mr. Pakes, I hand you a check marked exhibit 13 made payable to Harry E. Krussman, and ask you if it is the refund check which was tendered to Harry E. Krussman as refund of assessments on November 14, 1940?

Mr. Jones: We ask that this be marked exhibit 13, now.

A. Exhibit 13 is the original check payable to Harry E. Krussman covering the refund of installments from July 1939 to August 1940, inclusive.

Mr. Jones: I will skip the next question. At that point defendant offered exhibit 13, and we now offer exhibit 13 in evidence.

The Court: Admitted.

Q. Mr. Pakes will you explain how this check now comes to be in your possession? Was it returned by Mr. Krussman or someone in his behalf?

[89]

A. Yes, the check has been returned to this office without being cashed. It was received on December 2, 1940.

(Deposition of V. J. Pakes.)

The Court: This last exhibit, you understand that it was admitted.

Q. Did Mr. Krussman refuse to accept tender of refund?      A. He did.

Mr. Jones: Now I will skip the questions and answers to the bottom of page ten.

Q. Will you explain the duties of the financial Secretary in connection with receipt and transmission of assessments paid by members to the Secretary of the Society?

A. The financial Secretary, one of his duties is to remit all moneys to the home office paid to him by the members.

Mr. Jones: I will omit the questions and answers down to the bottom of page 11, third question from the bottom of page 11.

Q. As I understand it, Mr. Pakes, from your testimony, the society's defense to this action is that Mr. Krussman failed to pay the July 1939, installment of assessment and became suspended August 1, 1939, is that correct?

A. That is my understanding.

Q. Mr. Pakes, I hand you exhibit number 2, the benefit certificate involved in this action, and ask you who was the designated beneficiary at the time the certificate was issued?

A. At the time the certificate was issued, the designated [90] beneficiary was Sagred Marie Krussman, wife.

(Deposition of V. J. Pakes.)

Q. Was the beneficiary subsequently changed? If so, to whom?

A. The beneficiary was changed on the 29th day of May 1940 making the beneficiary Marian Alice Krussman, daughter.

Q. Calling your attention to the back of the certificate, may I ask whose signature appears under the words "endorsed by"?

A. It is the signature of Farrar Newberry, Secretary of the society.

Q. Mr. Pakes, I hand you exhibit 14 which appears to be a request for change of beneficiary, and ask you if that request was received by the Secretary of the society?

A. Exhibit 14 is the request for change of beneficiary and was received by the Secretary of the Society on the 27th day of May 1940.

Mr. Jones: I ask to have exhibit 14 marked by the Clerk as exhibit 14.

Q. Was the endorsement of change of beneficiary on the back of the certificate under date of May 29, 1940 made pursuant to the request contained in Exhibit 14?      A. It was.

Q. Mr. Pakes, referring again to exhibit 14, will you state whether the pencil notations and stamps appearing thereon were there when it was received, or were they placed there in your office?

(Deposition of V. J. Pakes.)

A. The marginal pencil notations and also the stamp notations were made at this office.

Mr. Jones: Mr. Yager offered the defendants exhibit 14 and we offer it at this time.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 14.

Pocatello, Idaho

May 24, 1940.

Cashier Dept A

May 27 1940

Mr. Bazil Flemming

Financial Secretary

Bannock Camp #7

Pacific Woodman Life Association

Omaha, Nebraska

OK

528-40 Change Endorsed May 29 1940

App. Record

Referring to certificate #T E 1321001, policy in the name of Eric A. Krussman, I wish to at this time change the beneficiary from Sacred Marie Krussman to my daughter Marian Alice Krussman.

I will appreciate you attending to this matter immediately.

I herewith turn over to you my certificate #T E 1321001 for which I'd appreciate your attending to the same.

Sincerely

E. A. KRUSSMAN.



(Deposition of V. J. Pakes.)

Acknowledging certificate #T E 1321001 for which I hereby receipt for receiving same.

Witness Sign            BASIL FLEMMING  
                                 Bannock Camp-7  
                                 Idaho

It is understood that this change of beneficiary is now in effect.

Sign. [231]

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Q. Mr. Pakes, I hand you a letter marked exhibit 15, dated June 17, 1940, addressed to Bazel Flemming, Financial Secretary of Camp 7, purporting to request change of beneficiary, and ask if that was received by the Society?

A. We received such a letter on August 8, 1940.

Q. I also hand you exhibit 16 which appears to be a letter from Eric A. Krussman, to H. E. Krussman and H. E. Krussman's reply thereto, and as if it was received by the defendant, and if so, when?

A. Said letter was received by the defendant society on August 8, 1940.

Q. Was exhibit 15 and exhibit 16 received at the same time?

A. They were received at the same time.

Q. At the same time the proofs of death were received?            A. On the same date.

Mr. Jones: We ask to have the two exhibits

(Deposition of V. J. Pakes.)

marked as exhibits 15 and 16 corresponding to the marking given before the Notary Public. Mr. Yager offered them in evidence and we offer them at this time as exhibits 15 and 16.

Mr. Merrill: I want it clear that we are not [92] offering any of these exhibits.

The Court: I am not interpreting it that way. The Plaintiff is now offering his case and these go in as the plaintiff's exhibits. That is the way I interpret this. It will be so understood and the exhibits are admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 15.

Pocatello, Idaho

June 17, 1940

Cashier Dept. M.

Aug 8 1940

Rec'd Aug 8 1940

Claim Dept.

Mr. Bazil Flemming

Financial Secretary

Bannock Camp #7

Pacific Woodman Life Association

Omaha, Nebraska

Dear Sir:

Referring to Certificate #TE-1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marian Alice Krussman to my son, Harry E. Krussman.

I will appreciate your attention to this immediately. I am herewith turning over to you my Certificate #T E 1321001, and would appreciate your attending to the matter at your earliest possible convenience.

Yours sincerely,

E. A. KRUSSMAN.

Acknowledging Certificate #T E 1321001, for which I hereby receipt for receiving same.

BAZIL FLEMING.

(Deposition of V. J. Pakes.)

It is understood that this change of beneficiary is now in effect.

BAZIL FLEMING. [232]

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PLAINTIFF'S EXHIBIT No. 16

Pocatello, Idaho

June 20, 1940

Cashier Dept. M

Aug 8 1940

Mr. Harry E. Krussman,  
Twin Falls, Idaho.

My dear Harry:

As you know, from our discussion here last Sunday, I hold Certificate No. TE 1321001, policy in Pacific Woodman Life Association, for the sum of \$5,000 payable to Marian Alice Krussman as beneficiary. I explained to you there were spiritual reasons that I did not want to have a guardian appointed over Marian for the collection and disposition of the proceeds of said policy; and in order to obviate the necessity of appointing a guardian, that I was going to change the beneficiary in the policy and make it payable to you, with the understanding of course that you would receive the proceeds in trust for the following purposes: that is to say, that you would use \$300 of the



(Deposition of V. J. Pakes.)

same for my burial expenses, pay to Beatrice Krussman Ginzal, my daughter, \$700; and the remaining \$4,000 to be held in trust and paid by you to Marian Alice Krussman for her enjoyment, support and education. That the payments to be made to her shall be at your discretion, as I know you will handle the matter for her best interests, the trust to last until she shall arrive at the age of majority, when the balance shall be paid to her by you.

At the time I had the discussion with you, you stated that you would be willing to accept the trusteeship, and handle the matter as I desire. As you know I have always been grateful to you for what you have done, and for what you will do in taking care of this matter, which is the most important thing to me which I can conceive of.

With love from your father,

ERIC A. KRUSSMAN.

Received Aug 8 1940. Claim Dept.

Twin Falls, Idaho

June 25, 1940

Mr. Eric Krussman,

Pocatello, Idaho

Dear Father:

I have just received the foregoing letter from you in which you refer to the conversation we

(Deposition of V. J. Pakes.)

had, and in which you state you are going to change the beneficiary under the certificate above described, from Marian Alice Krussman, to myself, in order that I may receive the proceeds direct and handle the same as directed in the above letter.

In the event that I am made beneficiary under such certificate, I hereby agree to accept the terms of the trust above set out and agree that if, as and when any moneys shall come into my hands as the proceeds of Certificate No. TE 1321001, policy in Pacific Woodman Life Association, I will use the sum of \$300 thereof for the payment of your burial expenses, immediately pay to your daughter Beatrice Krussman Ginzle the sum of \$700 and hold in trust the sum of \$4,000, being the remaining proceeds of said policy, for the use, enjoyment, benefit, education and support of your daughter Marian Alice Krussman, part or all of said \$4,000 to be paid to her during the time she is under the age of majority as in my discretion shall appear to be most beneficial to her; and I further agree that any of the said trust fund belonging to said Marian Alice Krussman, remaining in my hands after she shall have reached the age of majority, will be by me paid to her.

Your son,

H. E. KRUSSMAN. [233]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, was there a provision in the constitution, laws and by-laws in effect on the date the instruments designated as exhibits 15 and 16 providing for a change of beneficiary were received, and if so, please refer to the same?

A. Section 72, subsections (a) and (b) of the Constitution laws and by-laws adopted and amended in June, 1939, and in effect September 1, 1939, contains a clause for change of beneficiary which reads as follows: "Section 72 (a) Should a member desire to change the beneficiary or beneficiaries named in his certificate he may do so by filing with the secretary of the society his written request, properly witnessed, giving the name or names of such new beneficiary or beneficiaries; or by delivering the same to the financial secretary of a camp for transmission to the secretary of the society. The secretary of the society shall endorse the name or names of the new beneficiary or beneficiaries upon the certificate of the member, or he may issue a new certificate to him, subject to the same conditions as the one surrendered, [93] containing the name or names of the newly designated beneficiary or beneficiaries. He shall keep a record of such change in his office. In case of the death of such member after the execution and delivery of the request for change to the Secretary of the Society or to the financial secretary of a camp and before the change is executed by the secretary of the society, then and in that event the amount payable upon such certificate shall be paid to such newly

(Deposition of V. J. Pakes.)

designated beneficiary or beneficiaries according to the terms of such member's request.

(b) No change of beneficiary shall be allowed or be binding on this society or any beneficiary which is not requested in writing as herein provided more than twenty-four hours before the death of said member."

Q. Mr. Pakes, do you have records or knowledge as to the date upon which exhibits 15 and 16 were delivered to Basil Flemming, financial secretary of camp number 7?           A. No.

Q. Mr. Pakes, I hand you a letter dated August 6, 1940, marked exhibit 17, written by Mr. Basil Flemming, addressed to Mr. D. E. Bradshaw, and ask if that letter was received along with exhibit 15 and 16?           A. It was.

Mr. Jones: Defendant offered exhibit 17 and we wish to have it marked now and offer it in evidence. [94]

The Court: It may be admitted.



(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. 17

August 6, 1940

Cashier Dept. M.

Aug 8 1940

Mr. De E. Bradshaw  
Pacific Woodman Life Assn.  
Omaha Neb.

Esteemed Sovereign:

On June the 17, 1940, Mr. E. A. Krussman of Pocatello Idaho, signed in my presence a request for a change of beneficiary on his policy #1321001, And was to deliver to me the request after he had his attorney Mr. T. D. Jones write his son Harry the manner in which he wished him to dispose of the monies from the policy.

I left town on my vacation and did not return till Aug. 1, 1940. I have known Mr. Krussman for 35 yrs. and I also know this was his wish at the time of his death.

I feel that I am to blame in this matter, and I hope that you can handle as Mr. Krussman desired.

This arrangement also has the approval of all of his children as their signatures below shows.

Yours Truly,

BAZIL FLEMMING

MARIAN KRUSSMAN

MRS. BEATRICE GINZEL

H. E. KRUSSMAN

Received Aug. 8, 1940. Claim Dept. [234]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, was there at any time endorsed on the back of certificate Number T. E. 1321001 a change of beneficiary in accordance with the request contained in exhibit 15?

A. There was not.

Q. Referring again to the certificate, exhibit 2, will you please explain the stamp appearing on the face thereof concerning the change of beneficiary?

A. That was a customary procedure in the office referring to change of beneficiary with reference to the reverse side of the beneficiary certificate where the change of beneficiary was made.

Q. Was that placed there for the convenience of the home office when it came in?

A. It was put in there as a special warning, warning to the office help, or anyone outside.

Q. When was that placed there, Mr. Pakes?

A. It was put on at the same time the endorsement of change of beneficiary was made on May 29, 1940.

Q. Mr. Pakes, there also appears on the back of the certificate beneath the name of Marian Alice Krussman, daughter a notation in red pencil, "see request for change." Will you please explain to what that notation refers?

A. This is an office notation, and refers to a letter or some form of request that was filed here in the office for change of beneficiary. [95]

Q. Did that refer to a request for change of

(Deposition of V. J. Pakes.)

beneficiary which has been introduced in evidence as exhibit 15, and also exhibit 16?

A. It refers to those exhibits.

Q. Was that notation also put there for a warning and in the handling of the claim? A. Yes.

Mr. Jones: It is agreed by George Yeager counsel on behalf of the defendant, and T. D. Jones attorney for plaintiff, on behalf of the plaintiff, that V. J. Pakes, is the Assistant Secretary of the defendant Society, and as such has custody and control of all of its records, papers and correspondence with reference to members of the society, and the payment of assessments and especially the correspondence in connection therewith; and that he has full authority to bind the defendant upon all statements that he makes.

That is all the direct examination and I will go on with the Cross.

#### Cross Examination

By Mr. Jones:

Q. I show you what has been marked plaintiff's exhibit A, and ask if you recognize the signature on that letter? A. I do.

Mr. Merrill: We object to counsel cross-examining his own witness. [96]

Mr. Jones: We have a stipulation that we may read any part of the deposition.

(Deposition of V. J. Pakes.)

The Court: Yes, if you read it, then it is a part of your case. That is the interpretation I made earlier.

Mr. Merrill: Is that a ruling on my objection.

The Court: He is introducing this as his evidence. Either side may read any part of the deposition.

Mr. Jones: I will make him my witness, I don't care about that.

The Court: I understood that the side who examined a witness made him their witness, that is what happened here on this direct examination and now he goes on to the cross examination.

Mr. Jones: At the time of the taking of the deposition I started with this witness and then the attorney for the defendant said "let me take him" and that is the way it came that he examined him at the time of the taking of the deposition.

The Court: If this case should go to the upper Court it should be clear as to whose witness this is.

Mr. Jones: I will make the witness my witness.

The Court: Very well, now you may proceed [97]

Q. Whose is it?

A. H. W. McArthy's.



(Deposition of V. J. Pakes.)

Q. Mr. McArthy is a claim man?

A. Head of the claim Department.

Q. Of the defendant?

A. Of the defendant.

Mr. Jones: Will you admit that he had authority to write that?

Mr. Yeager: Yes, it is admitted on behalf of counsel for the defendant that Mr. McArthy had authority to write the letter which is identified as exhibit A.

Mr. Jones: We ask at this time to have that marked as exhibit A to correspond with the marking at the time of the taking of the deposition. We offer it in evidence at this time.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT No. A

Omaha Woodmen Life Insurance Society

Omaha, Nebraska

January 7, 1941.

Jones, Pomeroy & Jones

Attorneys at Law

Central Building

Pocatello, Idaho

Attention: Mr. T. D. Jones

Gentlemen: Re Eric A. Krussman, deceased

Certificate No. TE-1321001

Responsive to your request of January 3 we are enclosing the request for change of benefi-

(Deposition of V. J. Pakes.)

ciary executed by the late Eric A. Krussman in connection with the above numbered benefit certificate issued on his life by this Society.

This constituted a valid request for change of beneficiary in accordance with the provisions of the Constitution, Laws and By-laws of this Society.

Very truly yours

CLAIM DEPARTMENT

By H. W. McARTHY

hwm/mlf

encl [235]

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Q. Mr. Pakes, I show you exhibit B and ask you to state if you recognize the signature appearing on that letter?

A. I do. It is a letter from the Claim Department of the society, signed by H. W. McArthy to Jones, Pomeroy & Jones.

Mr. Jones: We can read this later if we desire.

The Court: Yes.

Mr. Jones: Will you admit Mr. Yeager that Mr. McArthy had authority to write exhibit B.

Mr. Yeager: Yes.

Mr. Jones: We ask that this letter be [98] marked as exhibit B and we offer it as plaintiff's exhibit B.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT No. B

Omaha Woodmen Life Insurance Society  
Omaha, Nebraska

January 14, 1941

Jones, Pomeroy & Jones

Attorneys at law

Central Bldg.

Pocatello, Idaho.

Attention: Mr. T. D. Jones

Gentlemen: Re: Eric A. Krussman, deceased  
Certificate No. TE-1321001

Replying to your letter of January 10, the Pacific Woodmen Life Association was changed by an amendment to the Articles of Incorporation to Omaha Woodmen Life Insurance Society, effective as of August 3, 1937.

Proof of death of the late Eric A. Krussman was submitted to this office by the late Basil Fleming.

Very truly yours

CLAIM DEPARTMENT

By H. W. McARTHY

hwm/mlf [236]

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Mr. Jones: At the time of the taking of the deposition Mr. Yeager representing the defendant made the statement that the defendant ad-

(Deposition of V. J. Pakes.)

mits that proof of death was made by plaintiff Harry E. Krussman.

Mr. Merrill: Yes.

Q. I will ask you if Mr. Newberry Secretary, uses a stamp signature or does he sign his letters?

A. They are stamp signatures.

Q. I will ask you if the name on the back of the certificate, which is marked as defendant's exhibit 2, is the stamp signature, or the actual signature of the Secretary?

A. It is the stamp signature.

Q. Is that his regular stamp signature?

A. Yes, it is the regular stamp used. It is regular office practice.

Mr. Jones: Mr. Yeager also admitted in the deposition as follows: It is admitted by defendant that section 105 (a) and (b) of the 1935 and 1937 constitution laws and by-laws, marked as exhibits 3 and 4 respectively, and sections 103, (a) and (b) of the 1939 constitution, laws and by-laws, marked as defendants exhibits 5, contain the same provisions; and that Section [99] 111 of the 1935 and 1937 constitution, laws and by-laws contain the same provisions as Section 109 of the 1939 Constitution, laws and by-laws, and that said provisions were in effect from the time the certificate was issued to Mr. Krussman up to the date of his death, said Sections reading as follows:



(Deposition of V. J. Pakes.)

Section 103. (a) The president and secretary of the Society shall appoint and may remove at will a financial secretary for each camp, who shall be paid at least the same compensation per member per month by the camp as has heretofore been paid to the Clerk by the local camp.

(b) The financial secretary shall have charge of all accounts of the members and attend to the correspondence concerning the standing of the members; shall receive and receipt for the camp dues and the sovereign camp fund payments and monthly installments thereof, and shall monthly pay the camp dues so collected to the banker, taking a receipt therefor. He shall make all reports and mail or deliver all notices required. He shall remit all funds due and belonging to the society to the secretary of the Society at the headquarters of the society as provided for in Section 109.

Section 109. On or before the fifth day of every month the financial secretary of each camp shall remit all the sovereign camp funds in his hands and all other funds [100] due the society to the secretary of the society. Such amounts shall be remitted in money order, certified check, bank cashier's check, or bank draft with exchange, payable to the order of the treasurer. Accompanying such remittance, the financial secretary shall also forward such

(Deposition of V. J. Pakes.)

detailed statement of the standing of the members in the camp as shall be required for the information of the secretary of the society, upon blanks furnished for that purpose.”

Q. You stated on direct examination that in the check that you forwarded as a refund for payment made from July 1939, to and including August 1940, that you deducted from the amount of the installments paid during that period the sum of \$10.55 which had been paid to him for gains and savings on his certificate in February, 1940.

A. That is correct.

Q. Will you explain what the gains and savings, you mention represent?

A. Those were savings during the preceding year that had accumulated from excess interest collected, and savings in management, expenses, and other items. There was distributed the sum of about \$1,100,000 among all members that had been members for two or more years, and the proportionate part on this certificate amounted to \$10.55.

Q. Can you state what amount you paid on the certificate of Mr. Krussman for the year 1939?

[101]

A. 1939 was also \$10.55

Q. \$10.55 when was that paid?

A. The check was issued on February 25, 1939.

Q. To whom was it transmitted.

A. It was transmitted to Eric A. Krussman.

(Deposition of V. J. Pakes.)

Q. Was there any letter accompanying it?

A. Yes, there was.

Q. May I see it?                      A. Yes.

Q. The savings and gains that you deducted had been paid to him in the year 1940 had they not?                      A. Yes.

Q. Was there a letter accompanying that?

A. Yes, there was

Mr. Jones: The defendant does not object to the plaintiff cross-examining witness with reference to these gains and savings. I guess that statement is not necessary in there because I stated I would make the witness my witness.

Q. I show you Mr. Pakes, what has been marked as Exhibit C, being a letter dated February 1, 1940, purporting to be from D. E. Bradshaw, President of the defendant Company and ask you if you recognize the signature on that letter.

A. I do.

Q. Whose signature is it?

A. It is the signature of D. E. Bradshaw, President of the [102] of the society.

Q. Do you know whether that letter, or a similar one was sent out to Eric A. Krussman on the date it bears, February 1, 1940?

A. Yes, such a letter was sent to him.

Q. State whether there was anything accompanying that letter?                      A. A check.

Q. Payable to whom?



(Deposition of V. J. Pakes.)

A. Check for \$10.55 payable to Eric A. Krussman, Pocatello, Idaho.

Q. Was that a check for the payment that you say was deducted from the check you forwarded, marked Exhibit 13?           A. That is correct.

Mr. Jones: We wish to have that check. This letter is marked exhibit C and we offer it in evidence.

Mr. Merrill: We object to it. It is immaterial for any purpose.

The Court: I don't know what is in the letter I will look it over now, and you may go on.

Q. Mr. Pakes I show you what has been marked as exhibit D, and will ask you to state, if you know what that is?

A. That is a distribution of savings check issued on February 1, 1940, payable to Eric A. Krussman.

Mr. Jones: May I have this check marked C, the first one, and then I desire to have this photostatic copy of check marked exhibit D.

[103]

Q. Is that the check that accompanied letter that was sent out with a letter similar to exhibit C?

A. Yes, that is the check that accompanied a letter similar to that marked Exhibit C.

Q. I will ask you to state whose signature D. E. Bradshaw is on the check, if you know.

A. D. E. Bradshaw is President, and Farrar Newberry is the Secretary.



(Deposition of V. J. Pakes.)

Mr. Jones: We offer in evidence Exhibit D, and ask Mr. Yeager if you will be willing to make a photostatic copy of this and send it along with the exhibits?

Mr. Jones: Mr. Yeager announced that it would be satisfactory, he said "that will be satisfactory, we will do that.

Mr. Jones: There will be no objection made to the photostatic copy being used the same as if the original was forwarded. Mr. Yeager said: "that is correct."

Q. I will show you Mr. Pakes, what purports to be a form letter bearing date February 25, 1939, and ask you if you know whose signature is signed to that letter marked exhibit E.

A. The signature is that of D. E. Bradshaw, President of the society.

Q. Do you know whether that letter was forwarded or letter similar to that was forwarded to Eric A. Krussman at [104] Pocatello?

Mr. Jones: We ask that the letter be marked as exhibit E.

The Court: Exhibit C seems to be a circular and it has authorized cash payment upon certificates in force two or more years, and says that check in herewith inclosed. Witness refers to this statement.

Mr. Merrill: My objection was that it is immaterial for any purpose. I assume that he

(Deposition of V. J. Pakes.)

wants to introduce it as an element of a waiver or estoppel, my position is that unless the one that sent that letter knew of his ill health, that this is immaterial.

The Court: I was thinking that the last paragraph of exhibit C would be admissible. The rest may be just a general circular but this refers to the check. I am letting this last paragraph in.

Mr. Jones: This is a letter written by the company or society and they said they sent one like this to Mr. Krussman.

The Court: Yes, that's true. I think I will admit exhibit c.

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PLAINTIFF'S EXHIBIT No. C

Woodmen of the World  
Life Insurance Society  
Omaha, Nebraska

Office of the President

February 1, 1940.

Esteemed Sovereign:

On June 6th, 1940, Woodmen of the World  
Will be 50 Years of Age!

We are as one in our pride in the great record of service to American families which our Society has made through the changing conditions of the past century. We see the

(Deposition of V. J. Pakes.)

spirit of fraternity running like a golden, unbreakable thread through all its efforts from the day its organization was announced by Joseph Cullen Root to the present time. In its more than 8,000 Camps the hands of brotherhood are extended during periods of sickness and distress, and in our sanatorium at San Antonio the ministry of healing is practised among those Sovereigns afflicted with tuberculosis.

Through prosperity and depression, war and epidemic, the Society's financial growth has paralleled its activities in the field of fraternalism. It has paid to living members and beneficiaries more than \$300,000,000, and its asset structure of over \$129,000,000 puts it in the front rank of insurance organizations in America.

Appreciation of these things can be best expressed through the cooperation of all members in the success of Golden Anniversary Campaign, which began January 1st and will end June 6th. This special endeavor covers a period when rejoicing over past accomplishments and pride in present strength may spur us to attend meetings of our Camps, to assist in the presentation of Anniversary celebration programs, and to urge our friends to join with us in membership.

(Deposition of V. J. Pakes.)

For your assistance in securing an application you will be presented, upon the completion of the membership, a Gold Lapel Wedge Pin. At the same time you will be helping your Camp to win a beautiful Golden Anniversary Banner. For particulars, see your field man or financial secretary.

Enclosed find Anniversary Coin Test, which you will wish to use and keep as a souvenir of the celebration, and an Emblem Sticker to place upon your car or office or home door or window for all to see.

Our Board of Directors has authorized the payment of a Cash Refund for the year 1939 upon certificates in force for two or more years, and check for yours is herewith enclosed.

Fraternally,

De E. BRADSHAW,

DEB:EW

President.

(Emblem)

(Emblem)

1890

1940

Golden Anniversary [237]

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Mr. Jones: And we now offer exhibit D.

The Court: It is admitted.

Mr. Jones: Now read the answer to the last question.



(Deposition of V. J. Pakes.)

A. Yes, such a letter was sent, together with a check to [105] Eric A. Krussman on or about February 25, 1939.

Q. Was it sent by the defendant Company?

A. Yes.

Mr. Jones: Now, we offer exhibit E.

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT No. E

Woodmen of the World  
Life Insurance Society  
Omaha, Nebraska

Office of the President

February 25, 1939

Esteemed Sovereign:

The Woodmen of the World was dedicated by its founders nearly half a century ago to the service of the American family through home protection and the application of the tenets of brotherhood. In times alike of prosperity and depression it has kept safely and steadily to these purposes, and its officers have directed its affairs in the interest of the members.

On account of economies effected in 1938 we are happily in position to make another refund

(Deposition of V. J. Pakes.)

to each of our members of over two years' standing, and yours is herewith enclosed.

Naturally we are proud of the recognition accorded the Society by insurance and other financial interests of the nation. And remember, our fraternal service has kept pace with our financial progress. At San Antonio, Texas, our free hospital continues to assist those members afflicted with tuberculosis, and it has recently won credit from the American College of Surgeons and the American Medical Association.

Our camps in ever greater numbers are extending the hand of brotherhood to their members and families in times of distress and need. They continue to enroll scores of thousands of new Sovereigns each year. A nation-wide movement is now being launched to be known as President's Recognition Campaign. Appreciating the confidence accorded, let me express the belief that many more thousands will be added to our rolls during this activity.

Never in our whole history has there existed such a spirit of loyalty and such manifest desire on the part of officers, Home Office employees, fieldmen and financial secretaries, and members generally to "work together" for the success and expansion of this institution.

Let me suggest that your continued support of the Society may be shown not only by speaking favorably of it to your friends, but in a

(Deposition of V. J. Pakes.)

very practical way (provided you are now in good health and under 60) by Increasing Your Own Protection in the W. O. W. If you now carry Ordinary Life, for instance, you may be interested in a certificate of one of our other forms as an addition.

We hope to hear from you shortly and enclose post card for your convenience.

Fraternally,

De E. BRADSHAW,

DEB:EW

President [238]

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Q. The check you say that accompanied this letter was a check for what?

A. The check was also for distribution of savings accumulated in 1938 and distributed in 1939 to the members of the society.

Q. I show you what purports to be a check bearing the signatures of D. E. Bradshaw and Farrar Newberry, countersigned by Bess Cooper dated February 25, 1939, and ask you if you recognize that exhibit, marked exhibit F?

Mr. Jones: I ask that this be marked at this time as exhibit F.

A. Yes, I do.

Q. What is it?

A. It is a refund check for distribution of savings issued to Eric A. Krussman, Pocatello.

(Deposition of V. J. Pakes.)

Mr. Jones: Defendant makes no objection to witness testifying as to what the check is and what its terms are before its introduction.

Q. Whose signature do you recognize on that check? [106]

A. I recognize the signature of D. E. Bradshaw, President and Farrar Newberry Secretary, countersigned by Bess Cooper.

Q. Are those the signatures of the President and Secretary? A. They are.

Q. And the signature of Bess Cooper who countersigned it? A. Yes.

Q. Was that check sent with a form letter similar to exhibit E? A. Yes.

Q. And to whom was it sent?

A. It was sent to Eric A. Krussman, Pocatello, Idaho.

Q. Being the same Eric A. Krussman for which this action is brought? A. Yes sir.

Q. About when was it sent?

A. It was sent on or about February 25, 1939.

Q. What did the check represent?

A. It represents distribution of Savings accumulated in the previous year.

Q. For whom, in this particular case?

A. For Eric A. Krussman.

Mr. Jones: We offer in evidence exhibit F. May it be agreed that a photostatic copy of exhibit F may be made, and forwarded along



(Deposition of V. J. Pakes.)

with the exhibits, and that no question will be raised as to the fact that it is a photostatic copy? Mr. Yeager agreed to that.

The Court: Do you offer it now. [107]

Mr. Jones: Yes, we offer it now.

The Court: It may be admitted.

Q. I now show you, Mr. Pakes, what has been marked as exhibit F-1 for identification, purporting to be a letter dated February 25, 1938, and purporting to bear the signature of D. E. Bradshaw, and ask you if you recognize that? A. I do.

Mr. Jones: I wish to have it marked F-1

Q. What is it?

A. It is a letter sent out February 25, 1938 to members that participated in distribution of savings.

Q. You say it is a letter. It is an exact copy of similar letters that were sent out?

A. It is a form letter.

Q. Do you recognize the signatures?

A. I do.

Q. Whose signature is it?

A. That of D. E. Bradshaw, President.

Q. President of defendant society.

A. Yes.

Q. Do you know about when a similar letter was mailed to various certificate holders?

A. It was mailed on or about February 25, 1938.

Q. Was a similar letter sent to Eric A. Kruss-

(Deposition of V. J. Pakes.)

man, the holder of the certificate sued on in this action?       A. It was. [108]

Q. Do you know whether anything accompanied the letter that was sent to Eric A. Krussman?

A. Yes, a refund check.

Q. You state that there was a check that accompanied the letter to Eric A. Krussman. I show you what has been marked exhibit H and ask if you recognize that as being the check that was forwarded to Eric A. Krussman?       A. I do.

Q. What date does it bear?

A. February 25, 1938

Q. Do you recognize the signatures on that check?

A. I do. Signatures of D. E. Bradshaw President. Farrar Newberry, Secretary, countersigned by Bess Cooper.

Q. Are those genuine signatures of those officers and party?

A. Lithographed signatures, recognized by the bank and by our society.

Q. The figures \$10.55 appearing on that check represent what?

A. Represents the amount that was payable by this check.

Mr. Jones: I wish to have this marked as exhibit H. We now offer exhibits F-1 and exhibit H.

Mr. Merrill: We object to both the exhibits as being immaterial for any purpose. In addi-

(Deposition of V. J. Pakes.)

tion to the objection made to the previous exhibits I call Your Honor's attention to these two matters having to do with dates prior to any controversy that occurred here.

Mr. Jones: We were in arrears for some four [109] years that they allowed him to do this. We say that it is material, it did induce him to believe that they had waived any prompt payment clause. Of course, if they admit that he was in good standing, I will not pursue this.

The Court: I think I will admit it.

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PLAINTIFF'S EXHIBIT No. F-1

Woodmen of the World  
Life Insurance Society  
Omaha, Nebraska

Office of the President

February 25, 1938

Esteemed Sovereign:

You will rejoice with us that, by continued economies in management, by favorable mortality experience, and as the result of a studied policy of careful investment we are enabled to hand you the enclosed Refund Check.

We may well be mutually happy over many evidences of the pronounced success of our beloved Society. Our assets, amounting to over \$125,000,000, are carefully serviced, periodically

(Deposition of V. J. Pakes.)

examined by experts, and show us to be in a remarkably strong position. Our reputation for the prompt payment of legitimate claims is attested by hundreds of letters from gratified beneficiaries. Our camps, equipped in 1937 membership campaigns with new paraphernalia for service, particularly in initiation, show an awakened and wide-spread interest in the cardinal purposes for which the institution was founded.

Our hospital property at San Antonio, Texas, has been greatly improved and our tuberculous guests have been made to feel more comfortable and more at home.

Our Radio Station WOW is a medium of increasing entertainment and information to our membership and the public, and serves to advertise the financial and fraternal strength of the Society.

Last March we wrote about 29,000 new members. I understand that a movement is now being launched under the title "President's All-Member Campaign," challenging the nationwide, uniform cooperation of our great membership, in which more thousands of applications will doubtless be secured, and that individual members assisting will be rewarded with valuable premiums. I am grateful for the compliment given me in the naming of this campaign, and predict most creditable results.



(Deposition of V. J. Pakes.)

With this check let us offer our sincere good wishes and the hope that the year 1938 may bring you all your heart desires of material and spiritual comfort.

Faternally,

De E. BRADSHAW,

DEB: EW

President. [239]

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Q. We again show you exhibit H, and ask you what that \$10.55 represents. Why was that paid?

Mr. Merrill: We object to that as immaterial.

The Court: Overruled.

A. It was the proportionate part of the savings accumulated in 1937 and distributed to all members that were entitled to it.

Q. Does the \$10.55 shown by this check represent the amount that was due Mr. Eric A. Krussman under his certificate for gains and savings?

A. Yes, it does.

Q. For the year 1937?

A. Yes.

Mr. Jones: Again Mr. Yeager, you have no objection that I have asked him under cross examination these questions. Mr. Yeager said he had no objection.

Q. If I understood you correctly, Mr. Pakes, you stated that gains and savings on certificates

(Deposition of V. J. Pakes.)

were not distributed to any certificate holder until the certificate had been in force two years? [110]

A. Two years or more.

Q. Then there was none prior to that time distributed to Mr. Krussman?

A. That is correct.

Q. His certificate was taken out in September.

A. September 1935.

Q. Then it would be two years old on September 1937? A. That is correct.

Q. Under the rules, would he not be entitled to a portion of the year's gains and savings?

Mr. Merrill: Objected to as leading.

Mr. Jones: The stipulation waived any objection as to the form of the question. I will read the stipulation at this time.

“It is hereby stipulated and agreed by and between the above named parties, by and through their attorneys of record, that the depositions of Farrar Newberry, Secretary of Omaha Woodmen Life Insurance Society, of Omaha, Nebraska, and B. J. Pakes, Assistant Secretary of said Society, witnesses on behalf of the above named defendant, may be taken before Katherine V. Peterson, Notary Public in and for the County of Douglas, State of Nebraska on the fourth floor Insurance Building, Northwest corner of Seventeenth and Farnam Streets, Omaha, Douglas County, Nebras-

(Deposition of V. J. Pakes.)

ka, on Thursday, the 21st day of August, 1941, beginning at the hour of 10 o'clock A. M. of said day and [111] continuing until completed; that said depositions may be taken in shorthand, upon oral interrogatories and answers thereto, together with such exhibits as either party may tender, and that when so taken the same shall be transcribed and reduced to writing signed by the witnesses, and certified by the said Notary Public, and transmitted to W. D. McReynolds, Clerk of the above entitled Court, Boise, Ada County, Idaho; and the depositions, so taken, may be read by either party to the action as evidence on the trial of said cause, subject, however, to all legal objections and exceptions, except as to the form of the interrogatories, that could be taken in case the witness were personally present and testified at the trial, it being expressly stipulated and agreed that all technicalities and formalities in respect to the taking, subscribing, certifying and transmitting of said depositions are hereby waived, so that these depositions can be used for all purposes as if they had been fully complied with.

It is further stipulated that said defendant, following the taking of said depositions, may, if it so desires, also take the depositions of any other officer or agent of the defendant corporation who might be produced at said time and

(Deposition of V. J. Pakes.)

place as a witness or witnesses on behalf of said defendant, and that said deposition may be taken before the same Notary Public, [112] in the same manner and with like effect as the deposition of Farrar Newberry and/or B. J. Pakes, and thereafter transcribed, signed, certified and transmitted and used in the same way.

It is further stipulated that either party to this action may be represented in the taking of said deposition or depositions by counsel who may not be of record in this cause, and that counsel so taking said deposition may, by agreement, change the time and place for the taking thereof, or may make any other change with respect to said deposition as they may agree upon.

Dated this 8th day of August 1941."

And that is signed by attorneys representing both parties here.

The Court: Overruled.

A. No, he would not.

Q. The first time he became entitled was in 1938?

A. It was based on good standing as of December 1, 1937.

Q. Who was the financial secretary of camp number 7 at Pocatello, Idaho, during the time and after the time Mr. Krussman took out the



(Deposition of V. J. Pakes.)

certificate sued on up to the time of Mr. Krussman's death, if you know?

A. Basil Flemming.

Mr. Jones: I make Mr. Pakes my witness for these questions,—I have already announced to the Court that I was willing to make him my witness. [113]

Q. He was the financial secretary during the entire period of membership of Mr. Krussman?

A. Yes.

Q. Mr. Pakes, are monthly reports prepared in this office sent out in duplicate to your various financial secretaries?

A. Yes, they are prepared in this office and sent out to the financial secretaries with a duplicate.

Q. One of those is the duplicate retained by the financial secretary, and the original sent back in here with the money? A. Yes.

Q. Is it audited each month?

A. It is audited each month.

Q. I show you, Mr. Pakes, what has been marked as exhibit G for identification, and ask you if you recognize the endorsement upon that check?

A. I do.

Q. By whom was it endorsed?

A. It was endorsed by Morris Sheppard, Pacific Woodmen Life Association, John T. Yates, Sovereign Clerk.

(Deposition of V. J. Pakes.)

Q. Was that the proper endorsement of your society?      A. It was.

Q. Do you know whether that check was received by the defendant?      A. It was.

Q. About when was it received?

A. It was deposited April 7, 1936.

Q. Was it paid,—the check? [114]

A. The check was paid.

Q. Proceeds received by the defendant?

A. They were.

Q. What installment was it applied upon, if you know?

A. It was applied on installment Number 4 for April, 1936.

Q. Who was Morris Sheppard?

A. He was treasurer.

Q. Who audits the reports?

A. The Auditing department, various members of the auditing department.

Q. You, as Assistant Secretary, are familiar and knew that this check was received?

A. That is right.

Mr. Jones: I wish to have that marked as exhibit G. I will now offer it in evidence.

Mr. Merrill: Objected to as immaterial.

The Court: Admitted.

Mr. Jones: In order to shorten the record, a separate stipulation has been entered into and signed by the respective attorneys

(Deposition of V. J. Pakes.)

herein which may be introduced by either the plaintiff or defendant at the trial.

Q. Mr. Pakes, from an examination of the monthly reports of Basil Flemming, the financial secretary at Pocatello, Idaho, how many members were delinquent during the month of July, 1939?

[115]

Mr. Merrill: We object to this as being immaterial. I call attention to section 40-2331 of the Idaho Code annotated which is the same as section 20 Chapter 225 1911 session laws and provides: "The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." That is the statute, and the certificate they have introduced in evidence provides: "If the payments required by the constitution, laws and by-laws of the Association are not paid by the member, this certificate shall be null and void. Should this certificate become void for any cause, acceptance of any payment from or for the member, or other act by any camp officer or member of the Association thereafter, shall not operate as an estoppel

(Deposition of V. J. Pakes.)

or as a waiver of the terms of this contract.” Our position is this, that this has to do with the local camp, and if the local financial secretary or officers of local camp allowed payment by delinquent members, they didn’t have a right to do this and it would not be a waiver on the part of the sovereign camp in this type of matter.

The Court: I am going to allow this evidence [116] in and if I determine to rule otherwise I will strike all this evidence. I think I ought to receive the evidence at this time and then if I reach the conclusion as you are contending, then the record may show that I will strike the evidence.

A. The reports will show it.

Q. Does the report for the month of August show it is for the installment of July?

A. That is right.

Q. When was that report received?

A. It was received August 18, 1939.

Q. That report shows that the payments thereon were for the month of July?

A. Yes, July.

Q. You received the pay in your office here on August 18th? A. That is right.

Q. Can you tell from that report how many of those members paid during the month of July?



(Deposition of V. J. Pakes.)

A. We can tell. There are thirteen listed, of which three are reported for suspension, which makes remittance covering ten members.

Q. You cannot tell when that money for those installments were actually received by Bazil Flemming, your financial Secretary?

A. From this report?

A. Yes. [117]            A. No.

Q. As far as you know from that report each and every member listed thereon may have paid the July installment in the month of August prior to the 17th day of August, 1939?

A. We could not tell from this report.

Mr. Merrill: It is understood that it goes in under that general objection and the statement made by the Court.

The Court: Yes.

Q. You do not know whether or not the ten that you mention on here, that are reported to have paid,—whether that money actually came into the hands of Bazil Flemming, the financial secretary in the month of July or the month of August, to the 17th?            A. No.

Mr. Jones: There is no objection to my asking the Assistant Secretary, the witness on the stand, with reference to facts appearing in the reports without having offered the reports in evidence. Mr. Yeager said that there was no objection. That shows in the deposition.

(Deposition of V. J. Pakes.)

Q. Can you tell by examining the report that was received by you on July 19, 1939, for the installment of June, what portion, if any, of the payments listed thereon was received in July by the financial secretary?

A. No, I cannot tell from this report. [118]

Q. On what date was the report that we are considering which was received by you on July 19, 1939, made up by Bazil Flemming, the financial Secretary, as appears from the report?

A. It was made up for the installment for June.

Q. And certified by him on what date?

A. Certified by him on July 18, 1939.

Q. On the report made up by Bazil Flemming, the financial secretary, on July 18, 1939, it lists Eric A. Krussman as having paid \$11.70. Is that right?

A. That is right.

Q. For what installment?

A. For installment Number 6.

Q. Is it a fact that from the check shown in evidence that \$11.70 was not paid until the month of July? Is that true?

A. It was paid to the home office in the month of July.

Q. By check. A. Check 372.

Q. That is the check bearing date of July 18, 1939? A. Yes.

Q. In the report you received on July 19, 1939,

(Deposition of V. J. Pakes.)

Eric A. Krussman is listed under column 1 as a member of the society?       A. Yes.

Q. Referring to the report of the financial secretary, Bazil Flemming, that report was received by you on January 22, 1940, was it not? [119]

A. Yes.

Q. It listed Eric A. Krussman as a member of the Order at that time?       A. Yes.

Q. This report as you have heretofore testified is made up by your home office?

A. That part of it which is printed.

Q. That lists the members?       A. Yes.

Q. Then the report for the next month, the month of January 1940, which would be for the first installment, when would that be mailed out, if you know?

A. It was due here on the fifth day of February, but it was received here on the 21st day of February.

Q. Do you know when it was mailed out?

A. It is signed by Bazil Flemming on the 17th day of February.

Q. According to the constitution, laws and by-laws of the company, the financial secretary is required to return those reports not later than the fifth day of the month.

A. They are due here on the fifth day of the month.

Q. But it is a fact that they were never received by you until the middle or latter end of the month,

(Deposition of V. J. Pakes.)

and that was true during practically all the time Mr. Krussman held his certificate with the defendant?

A. I think that has been the practice.

Q. There are not instances that you know during that time [120] when the monthly report was received by you as early as the fifth of the month?

A. Without consulting the records I could not say.

Q. I wish you would consult your records for at least two years prior to the death of Mr. Krussman and indicate whether any of those reports were received before the fifth day of the month.

A. None of those reports for 1939 and 1940 were received on the fifth day of the month.

Q. On or before the fifth day of the month?

A. No.

Q. Most of them were received around the——

A. The 18th or 19th.

Q. Do you know, or can you tell how many members were delinquent in the camp at Pocatello, camp number 7, during the month of July, 1940?

A. I cannot tell from these reports. I would have to consult the records in the auditing department.

Q. Could you state whether there was a substantial number of them?

A. Not a substantial number, there might be three or four.



(Deposition of V. J. Pakes.)

Q. You knew that Mr. Eric Krussman, from the checks he forwarded here, was delinquent for a long period of time, did you not?

A. I would not know that. [121]

Q. Would you not know from the check?

A. We would not examine the check.

Q. The check would be listed, would it not?

A. It would.

Q. The date of it.           A. No.

Q. You would not pay any attention as to whether a check was given the month following or after the last day of the month for the payment of the installment falling due in that month?

A. No, we would not.

Q. Through whose hands would these checks pass?

A. The checks pass only through the hands of the Cashier.

Q. Then your secretary and treasurer do not know about the affairs of the business?

A. They could not know all the details, there are 350,000 members. These members are listed every month, and they could not examine every one of those checks.

Q. Was not your Treasurer on these checks I have shown you, and which have been introduced in evidence? It appears the stamp of the company was placed on them to acknowledge them,—endorsements.           A. Yes.

(Deposition of V. J. Pakes.)

Q. To whom was authority given to cash checks and endorse the name of the company? [122]

A. The checks are deposited in the bank by the cashier.

Q. By the cashier of the company.

A. Yes.

Q. Then the cashier could observe the date the check was drawn, if he cared to do so.

A. Yes, if he cared to do so.

Q. You delegate that authority to him to endorse the checks.      A. No.

Q. Who endorses them?

A. The bank has authority to endorse our checks.

Q. What banks?

A. The Omaha National Bank.

Q. You delegate to the bank the right to endorse your checks?      A. Exactly.

Q. Then the bank, of course, record that check and know the date, would it not,—various checks?

A. I doubt if they would record both the check and the date. I am quite sure they do not record any dates.

Q. What record do they keep?

A. They keep the record of the amount of the check.

Q. Of all foreign checks,—do they keep a record of them?

A. Those are the mechanics of the bank, and I do not know.

(Deposition of V. J. Pakes.)

Q. But you do know that Eric Krussman was late all of these years, do you not?

A. Only when he was reported on the report.  
[123]

Q. He was reported late on the reports from time to time. A. Yes.

Q. You knew he was in default ever since 1936. Did you? A. No, I would not know that.

Q. Do any of your reports show that he was in default in 1936?

A. I would have to look through them. On report for installment number 10, received here on November 17, 1936,—received here on November 17, 1936, he was reported for failing to pay the current installment.

Q. Under your instructions to the financial secretary on the monthly report it is requested that remittances be forwarded how, to your company?

A. They are supposed to be reported by money order, express order, certified check, cashier's check, payable to the treasurer of the society.

Q. But Mr. Krussman never did comply with any of those requirements?

A. They were personal checks.

Q. You always accepted his personal checks.

A. Yes.

Q. All of his installments were paid by personal checks. Is that not true?

A. Except—some were not.

(Deposition of V. J. Pakes.)

Q. With the exception of two checks that were cashed by Mr. Flemming. A. Yes. [124]

Q. Were any of these checks transmitted by Mr. Krussman to Mr. Flemming ever returned to him with the request that Mr. Flemming get a bank draft? A. Not so far as I know.

Q. The auditor of the company went over these reports each month? A. Yes.

Q. Who was the auditor?

A. They change around.

Q. On the report received by you on the 17th day of November 1936, it is provided that on or before the fifth day of each month the financial secretary of the camp must furnish the secretary of the Pacific Woodmen Life Association, Omaha, Nebraska, with a detailed statement of the standing of the members of the camp. Do you know whether your financial secretary gave you detailed reports of the standing of the members?

A. Yes, he did.

Q. He did that from time to time.

A. Every month.

Q. Then your company knew the standing every month of the members of the society in camp number 7.

A. Yes, as they were given in the monthly reports of the financial secretary.

Q. Could you tell from the checks of Mr. Krussman, if you [125] had cared to examine them, that he was not paying his installments before the end of the month for that particular month?



(Deposition of V. J. Pakes.)

A. I suppose, if we had examined the checks we could.

Q. You paid some compensation to the financial secretary, didn't you?

A. Only for persistency of his business.

Q. What do you mean by persistency of his business?

A. New business that has been written and put on the books which has been maintained in good standing.

Mr. Merrill: I will object to this business of the financial secretary upon the ground that it is incompetent, irrelevant and immaterial for any purpose his duties are fixed by the constitution, the laws and the by-laws of the Company and set out in the certificates and they cannot be altered or changed.

The Court: That is one of the main questions in the case. I will let this go in the same as the other evidence.

Q. Is it not a fact you allowed special compensation? How much would you pay for putting new business on the books?

Mr. Merrill: May my objection go to this line of testimony.

The Court: Yes.

A. He was allowed a certain schedule of compensation, [126] according to the certificates that were in force, according to the amount of cer-

(Deposition of V. J. Pakes.)

tificates that were in force.

Q. That would be for making up his reports and keeping them.

A. I am speaking only of the business that has recently been put on, not for old business.

Q. Would he get the same as any other agent who wrote up new business? A. No.

Q. This compensation you paid was not for writing new members. A. It was not.

Q. It was for keeping the old members on.

A. The system of compensation for this persistent business has been changed from time to time. There was a time they were paid for four years; then there was a time when they were paid for two years; and there was a time when they were paid for net increase in the camp.

Q. It is a fact you paid him compensation for certain of his work.

A. You refer to Mr. Flemming.

Q. Yes.

A. I would have to look it up to see if he really got compensation. I do not know if he had any business that came in under that provision.

Q. He did get some compensation during that time. Did he not? [127]

A. He got some in 1938 and '39 and '40.

Q. I show you what has been marked exhibit I, and ask you to state, if you know, what it is?

Mr. Jones: I will ask to have the Clerk mark this as exhibit I.

(Deposition of V. J. Pakes.)

A. That is the monthly report of the financial secretary of the camp.

Q. It is for what month?

A. It covers installment No. 11, for the year 1938.

Q. Is there anything on it that indicates when it was received by defendant?

A. Yes, it was received on December 22, 1938.

Q. There are some pencil notations on it.

A. The pencil notations on the right side of the report indicate the amount of remittance and the kind of remittance.

Q. When was that put on?

A. It was put on on the date it was received in the cashier's Department, December 22, 1938.

Q. Put on at the home office?

A. Yes, at the home office.

Q. Do you observe in those pencil notations anything that indicates there was a personal check there?

A. Personal check 64 for \$11.85. Another personal check for \$10.82.

Q. Is Eric Krussman listed as a member on that report? [128] A. He is.

Q. What was the monthly rate?

A. His monthly rate was \$11.70.

Q. Is that indicated under column 3?

A. Yes.

Q. Is a similar report to that sent out each month and received by the various camps?

(Deposition of V. J. Pakes.)

A. Yes, it is.

Mr. Jones: We offer in evidence exhibit K.

Mr. Yeager: We have no objection.

The Court: Do you offer it now.

Mr. Jones: Yes, we offer it now, and at the time of the taking of the deposition there was no objection.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT NO. K

[Title of District Court and Cause.]

STIPULATION FOR TAKING  
DEPOSITIONS

It Is Hereby Stipulated and Agreed by and between the above named parties, by and through their attorneys of record, that the depositions of Farrar Newberry, Secretary of Omaha Woodmen Life Insurance Society, of Omaha, Nebraska, and B. J. Pakes, Assistant Secretary of said Society, witnesses on behalf of the above named defendant, may be taken before Katherine V. Peterson, Notary Public in and for the County of Douglas, State of Nebraska, on the Fourth Floor, Insurance Building, Northwest corner of Seventeenth and Farnam Streets, Omaha, Douglas County, Nebraska, on Thursday, the 21st day of August, 1941, beginning at the hour of 10 o'clock



(Deposition of V. J. Pakes.)

A. M. of said day and continuing until completed; that said depositions may be taken in shorthand, upon oral interrogatories and answers thereto, together with such exhibits as either party may tender, and that when so taken the same shall be transcribed and reduced to writing, signed by the witnesses, and certified by the said Notary Public, and transmitted to W. D. McReynolds, Clerk of the above entitled Court, Boise, Ada County, Idaho; and the depositions, so taken, may be read by either party to the action as evidence on the trial of said cause, subject, however, to all legal objections and exceptions, except as to the form of the interrogatories, that could be taken in case the witnesses were personally present and testified at the trial, it being expressly stipulated and agreed that all technicalities and formalities in respect to the taking, [241] subscribing, certifying and transmitting of said depositions are hereby waived, so that these depositions can be used for all purposes as if they had been fully complied with.

It is further stipulated that said defendant, following the taking of said depositions, may, if it so desires, also take the depositions of any other officer or agent of the defendant corporation who might be produced at said time and place as a witness or witnesses on behalf of

(Deposition of V. J. Pakes.)

said defendant, and that said deposition may be taken before the same Notary Public, in the same manner and with like effect as the deposition of Farrar Newberry and/or B. J. Pakes, and thereafter transcribed, signed, certified and transmitted and used in the same way.

It Is Further Stipulated that either party to this action may be represented in the taking of said deposition or depositions by counsel who may not be of record in this cause, and that counsel so taking said deposition may, by agreement, change the time and place for the taking thereof, or may make any other change with respect to said deposition as they may agree upon.

Dated this 8th day of August, 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff,

Residing at Pocatello, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

RAINEY T. WELLS, A.L.M.

Residing at Omaha, Nebraska

Attorneys for Defendant.

[Endorsed]: Filed Oct. 15, 1941. [242]

(Deposition of V. J. Pakes.)

Q. I show you what has been marked as exhibit J, purporting to be a letter to Mr. Basil Flemming from Farrar Newberry, Secretary, and ask you to examine it and state if the signature on that letter is the signature of Farrar Newberry, the Secretary?      A. It is.

Q. You are the assistant to the Secretary.

A. Yes sir.

Q. The party who puts that on is authorized to stamp that signature on there?

A. That is correct. [129]

Q. There are various individuals in the home office who have the authority to stamp that signature?      A. They have.

Q. Wherever it appears on letters sent out to your financial secretaries, it indicates the letter is a genuine letter from the secretary's office. Wherever that signature appears, is it authorized?

A. That is right.

Mr. Jones: We offer exhibit J.

Mr. Merrill: Objected to as immaterial.

The Court: Admitted.

(Deposition of V. J. Pakes.)

PLAINTIFF'S EXHIBIT NO. J

Omaha Woodmen Life Insurance Society  
Omaha  
Nebraska

December 30, 1938

7 Idaho

Mr. Basil Fleming, F. S.,  
236 No. 12th St.,  
Pocatello, Idaho.

Esteemed Sovereign:

Your report for installment No. 11 for the year 1938 has been audited and we find there is an over-remittance of \$1.27 on it.

You show as the total collection of your report the amount of \$43.80. You remit \$45.07, which causes the over-remittance of \$1.27 on this report. Deducting this amount from your previous debit balance of \$2.31 leaves a debit of \$1.04.

Special compensation in the amount of 75 cents was recently credited to your account, and deducting this amount from the above mentioned debit balance of \$1.04 leaves your account now showing a debit balance due from you of 29 cents, which amount kindly include thru line 6 of the summary when rendering your next regular report.



(Deposition of V. J. Pakes.)

Enclosed please find report list for installment No. 12 for the year 1938.

Fraternally yours,

FARRAR NEWBERRY,

Secretary. [240]

---

Mr. Jones: That is all the cross and now I read what is shown as redirect examination.

Redirect Examination

Mr. Merrill: He is still your witness.

Mr. Jones: All right, I will continue with the examination.

Q. Mr. Pakes, you identified and testified on cross examination to certain refunds which were made to Mr. Krussman, one being February 1938, one February 1939, and one February 1940. Would you explain a little more fully to whom distributions were made, and in what manner it was determined to whom distributions should be made?

A. The distribution was made to all members who have been continuously in membership for two years or more, and were in good standing to the end of the years for which [130] these checks refer. The amounts were determined actuarially, and distributed according to form of certificate, amount of certificate, amount of actual contribution, an-

(Deposition of V. J. Pakes.)

nual assessment and amount of reserve accumulated on these certificates.

Mr. Jones: I will omit to nearly the bottom of page 37, second question from the bottom.

Q. In other words, a person who becomes suspended before the date upon which the distribution was made and remained suspended would not be entitled to the distribution for that particular year?

Mr. Merrill: Now we object to that, this renders the deposition unintelligible leaving out a full page and reading only the one question. The question starts with "in other words." Unless the entire testimony is given it is misleading.

Mr. Jones: He may read it if he wants it in.

Mr. Merrill: It is unintelligible because it presupposes a condition.

The Court: I think Mr. Merrill is correct on that.

Mr. Jones: Let it go for the present. Now I will omit the deposition down to page 42, the first question under what is designated as

#### Recross Examination

Q. Mr. Pakes were there any such certificates at the local [131] camp in Pocatello, Idaho, which you have referred to?

Mr. Merrill: Objected to as immaterial, confusing and unintelligible.

(Deposition of V. J. Pakes.)

The Court: Sustained.

Mr. Jones: Reserving the right, if they go into any of these matters with this witness, that I may go into the matter further, I believe that is all.

Mr. Merrill: You are through with the deposition.

Mr. Jones: With the reservation I stated.

The Court: You may have that right. We will recess now until morning at 10 o'clock.

10 o'Clock A. M., October 23, 1941

Mr. Jones: I desire at this time to read the agreement in the stipulation between the parties relative to taking this deposition,—

Mr. Merrill: We object to the reading of this again, it is entirely immaterial.

Mr. Jones: I read a portion of it yesterday.

The Court: I thought this stipulation was read into the record yesterday.

Mr. Merrill: Yes, and we object now, it would be taking up the time of the court and is entirely immaterial.

The Court: It is a part of the record in the case.

Mr. Jones: Then at this time we offer in [132] evidence the stipulation entered into on the 8th day of August 1941 between the attorneys for the plaintiff and the attorneys for the defendant. I will ask that it be marked, and

(Deposition of V. J. Pakes.)

now I will offer in evidence exhibit K which is the stipulation to take the deposition.

The Court: It is admitted, of course.

Mr. Jones: That is all, of this witness or deposition.

Mr. Merrill: I want to make this observation: while this deposition of Mr. Pakes was originally taken by one of counsel for plaintiff, Mr. Jones has used it as his deposition, or the deposition of his witness, he has omitted certain parts which I assume he felt were not helpful to him. Now, as to whether these omitted parts may be considered as being in the record, or should it be presented by us when we commence our side of the case. It seems to me that it would be more helpful to the Court to have it in at one time, and if so I will go ahead with the deposition.

The Court: I think your stipulation covered the provision that either party may use any part of the deposition.

Mr. Merrill: That is right.

The Court: Then I suppose you may use any part you desire. [133]

Mr. Jones: It occurred to me that it might be better if he introduced what part of the deposition he desires at this time.

The Court: I think perhaps it is a good idea to keep the whole deposition together, and introduce it at one time.



(Deposition of V. J. Pakes.)

The following was read by Mr. Merrill, as cross examination.

Cross Examination

Mr. Merrill: On page two of the deposition there was an answer to the question: "Q. Has there been any change in the character of the society, along with the change in the name?" and the answer was that there was none. I don't think the next was read into the record.

Q. Will you please state what is the character of the society what type of society is the defendant?

A. The Omaha Woodmen Life Insurance Society is a fraternal benefit society organized under the laws of Nebraska, having a lodge system, ritualistic form of work, representative form of government, and conducted solely for the mutual benefit of its members, and not for profit.

Q. Mr. Merrill: The question at the bottom of page four of the deposition was asked and answered. I will read the questions and answers, at the top of page 4 of the deposition. [134]

Q. In addition to the \$11.70 was he required to pay anything to the local camp?

A. Yes, there were certain local camp dues.

Q. Is that fixed by the local camp?

A. Yes, sir, it is fixed by the local camp.

Mr. Merrill: At the bottom of page 4 the question was read, and answered: "If you

(Deposition of V. J. Pakes.)

know, was the claim for death benefit approved or rejected," and the answer was that the claim was rejected. I will start from that answer.

Q. Will you state why the claim was rejected?

Mr. Jones: That is objected to, it calls for a conclusion of the witness.

The Court: Overruled.

A. The claim was rejected because Mr. Krussman was automatically suspended by reason of information contained in the death proofs that he was at the time of attempting to again become a member, in ill health.

Q. Mr. Pakes, had he failed to pay any installments which were required?

A. The installments were paid, but they were not paid in proper,—in due time.

Q. When was he required to make payment of his monthly installments?

A. The monthly installments were due on the first of the month, with a grace period until the last day of the [135] month.

Q. Mr. Pakes, I hand you what purports to be a carbon copy of a letter addressed to Harry E. Krussman dated November 14, 1940, and ask if it is a part of the records and files of the society in your possession, and ask if the original of that letter was mailed to Mr. Krussman?

A. Exhibit 10 is a carbon copy of a letter sent to Mr. Harry E. Krussman under date of Novem-

(Deposition of V. J. Pakes.)

ber 14, 1940, and it is a copy of the letter that was actually forwarded to Mr. Harry E. Krussman.

Mr. Merrill: At the taking of the deposition Mr. Jones said that plaintiff admitted that Harry E. Krussman received the original of exhibit 10.

Defendant offers exhibit 10 at this time.

Mr. Jones: We object to that portion of the exhibit which sets forth any conclusions or reasons on the part of the party writing the letter. We have no objection at this time to the fact, which shows that tender refund, but we object to that part of the letter which states anything other than the rejection of the claim.

Mr. Merrill: We offer the whole letter.

Mr. Jones: Objection also that it is a self serving declaration.

The Court: Overruled, it is admitted.

(Deposition of V. J. Pakes.)

DEFENDANT'S EXHIBIT NO. 10

November 14, 1940.

Mr. Harry E. Krussman  
Twin Falls, Idaho

Dear Sir:

Re: Eric A. Krussman, deceased  
Certificate No. TE-1321001

Claim under the above numbered benefit certificate issued by this Society on the life of your father, the late Eric A. Krussman, has been rejected on the ground that he was under suspension at the time of his death, and upon all other grounds on which the Society may be found to be entitled to deny liability under the certificate, he having become suspended by reason of the fact that the July, August, September, October, November and December installments of the year 1939, and the January, February, March, April, May, June and July installments of the year 1940 were not paid by your late father to the Financial Secretary of the local camp on or before the last days of those months in which the installments were due on account of the benefit certificate.

Under the agreements contained in the application, the terms and conditions of the benefit certificate, and the provisions of the Constitution, Laws and By-Laws of the Society, all of which were a part of the contract between



(Deposition of V. J. Pakes.)

the Society and your father, the late Eric A. Krussman, each monthly installment of the annual payment on this certificate became due on the first of each calendar month, and when he failed to make payments of these installments on or before the last days of the months in which the installments were due, he became suspended, and the certificate became null and void.

The Constitution, Laws and By-laws of the Society in force and effect when the late Mr. Krussman became suspended specifically provided that a suspended person must be in good health when delinquent installment or installments are paid by or for him, and that he must remain in good health for thirty days thereafter in order to revive the benefit certificate which he had held and be restored to beneficiary membership thereunder. We have before us evidence constituting positive proof that the late Eric A. Krussman was not in good health when the delinquent installments subsequent to No. 6 for the month of June of the year 1939 were paid, therefore the payments under the provisions of the Constitution, Laws and By-laws of the Society as hereinbefore cited did not have the effect of reviving the above numbered benefit certificate which he had held, and the Society incurred no liability under the certificate by reason of Mr. Kruss-

(Deposition of V. J. Pakes.)

man's subsequent death on August 2, 1940, while under suspension.

Enclosed you will find Refund Warrant No. 10-54080 payable to your order in the amount of \$153.25, the amount remitted to the Secretary of the Society covering delinquent installments for the months of July, 1939 to July, 1940, inclusive, and installment No. 8 for the month of August, 1940, less the amount of refund or distribution of savings check issued and released by the Society February 1, 1940, payable to the order of your late father in the amount of \$10.55, representing gains and savings effected by the Society which would have been apportionable to the above numbered benefit certificate had payment of the installment thereon been made regularly and in due time and the certificate continued in force and effect.

In denying liability for death benefit under certificate No. TE-1321001 on the above ground, the Society does not waive any [252] other grounds on which it may be found to be entitled to deny liability thereunder.

Very truly yours,

CLAIM DEPARTMENT

By: .....

hwm/mlf

encl. [253]

(Deposition of V. J. Pakes.)

Q. Mr. Pakes, it appears in this letter that the installments [136] of assessment commencing with the month of July 1939 to and including August 1940, were tendered to Harry E. Krussman. Do you know if that tender was made, warrant issued and delivered to Mr. Krussman?

A. Yes, tender was made and check delivered.

Q. Less an amount of distribution of savings which was paid to him in February 1940?

A. Yes.

Mr. Merrill: Mr. Jones read the next few questions and answers down to the middle of page 6.

Q. Mr. Pakes, I hand you a note or letter dated August 25, 1939, from Bazil Flemming, and ask you if the remittance for the month of July 1939 was received with that letter marked exhibit 11?

A. Exhibit 11 is the original letter of Bazil Flemming the financial secretary, letter transmitting \$11.85 being a payment for E. A. Krussman for the month of July 1939 received at the office on August 28, 1939.

Q. When Exhibit 11 was received, did it have thereon any of the notations made in ink or stamps?

A. The notations in ink and stamp were made at this office.

Q. Do you have any information as to the date the payment of the July 1939 installment was made to Bazil Flemming the financial secretary? I mean

(Deposition of V. J. Pakes.)

the date Mr. Krussman paid the July installment?

[137]

Mr. Merrill: Down to the middle of page 7 was read.

Q. As I understand it, that covered fourteen installments, less \$10.55 which was deducted by reason of the distribution which had been made subsequent to the date you say he was suspended?

A. The check covers the said installments, less \$10.55 which was a check for the distribution of savings dated February 1, 1940.

Mr. Merrill: Now, we go to the second question on page 8 of the deposition.

Q. Mr. Pakes, as I understand it, you said Mr. Krussman became suspended August 1, 1939, by reason of his failure to pay the July 1939 installment on or before the last day of that month. Will you please state if there is any provision in the certificate or constitution, laws and by-laws in effect at that time requiring payments to be made before the last day of the month?

A. There is a provision in the constitution and laws and I believe it is section 63.

Q. You say Section 63.

A. Yes, I believe it is section 63.

Q. I hand you the constitution and ask you



(Deposition of V. J. Pakes.)

what section 63 provides in the event a member does not pay his installment before the last day of the month in which it [138] becomes due.

A. Section 63 provides for automatic suspension of a member if he fails to make payment on or before the last day of the month.

Q. Mr. Pakes, referring to the same exhibit, is there any provision therein providing that a person may reinstate his membership after suspension, and condition upon which reinstatement may be had?

A. Yes, there is a provision for such person to renew his contract with the society, if he is in good health.

Q. Would you mind reading that section as a part of your evidence?

A. "Section 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter. Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member,

(Deposition of V. J. Pakes.)

and to contract that such installments when so paid after he has become suspended for not [139] making payments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the society shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

Q. Mr. Pakes, as I understand from this section, if a member attempts to reinstate within three months from the date of suspension, he may do so by the payment of the delinquent installments, if he is then in good health?

A. That is a fact. He must be in good health and warrant that he will remain in good health for thirty days after such payment.

Q. That provision was in effect on August 24, 1939?      A. It was.

Q. Has it been in effect from 1935 up to and including 1939?

A. Yes, it was in effect for that period.

Q. Mr. Peaks, when installments are remitted to the society after the suspension of a member, do you make any inquiry as to the condition of the health of the member?      A. No.

Q. Are you required to do so? [140]

(Deposition of V. J. Pakes.)

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

A. No.

Q. Did you, or so far as you know, any other officer of the society have any knowledge of the condition of Mr. Krussman's health on August 24, 1939? A. No.

Q. When did you first receive information that Mr. Krussman was not in good health on August 24, 1939?

A. That condition was developed in the proofs of death.

Q. Then as I understand it, you had no knowledge of the condition of his health on August 24, 1939, until after his death?

A. That is right.

Q. Mr. Pakes, is there any provision in the constitution, laws and by-laws concerning the authority of a financial secretary of a local camp to change, alter or waive any of the provision of the constitution, laws and by-laws?

A. There is a provision. Section 82 of the constitution, laws and by-laws in effect September 1, 1937, provides that no officer, employee or agent of the society or the sovereign camp has power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, waive any of the provisions of the Constitution, laws and by laws. [141]



(Deposition of V. J. Pakes.)

Mr. Jones: That is objected to on the ground that it is not the best evidence.

The Court: If you have the constitution in evidence it would not be the best evidence. The objection is sustained.

Mr. Merrill: We would like to read the parts of the constitution which provide for this. There is a provision of the constitution which provides that no officer, employee or agent of the society of the sovereign camp has power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, waive any of the provisions of the constitution, laws and by-laws.

The Court: But counsel understands that is not a quotation of the constitution and the constitution is in evidence. Objection sustained.

Mr. Merrill: Exception.

Q. Will you refer to section 109, sub section (g) and please read that provision.

A. Section 109, sub-section (g) provides: "Section 109 (g). The financial secretary shall not by acts, representations or waivers, nor shall the camp by vote or otherwise, or any of its officers, have any power or authority to waive any of the provisions of the constitution, laws and by-laws of this society nor to bind the society by any such acts." [142]

Q. Will you explain the duties of the financial secretary in connection with receipt and transmis-



(Deposition of V. J. Pakes.)

sion of assessment paid by members to the secretary of the society?

A. The financial secretary,—one of his duties is to remit all money to the home office paid to him by the members.

Q. How about his duty concerning the receipt of the money? Is the member required to pay the financial secretary, or is he required by the constitution to make any collections?

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

A. The member is required to pay to the financial secretary. There is no duty involved on the part of the financial secretary that he should make the collections.

Q. As you understand the constitution, laws and by-laws, what governs the standing of a member,—the payment to the financial secretary, or the receipt of the assessment or installments of assessments by the Secretary of the Society?

Mr. Jones: Objected to as calling for a conclusion of the witness, it is all set out in the constitution and by-laws and what his understanding is would merely be a conclusion. [143]

Mr. Merrill: We call attention to the stipulation which counsel has called to our attention here, and we feel that he is not entitled to in-

(Deposition of V. J. Pakes.)

voke such objection. Had such objection been made at the taking of the deposition the constitution could have been quoted at that time.

Mr. Jones: We did not waive our right to object to these matters.

The Court: Now let the Court understand this. I understand that the constitution and by-laws prescribe the duties of the financial secretary.

Mr. Merrill: They do in part at least.

The Court: The Court will permit this subject to the understanding that if it is contrary to the by-laws and of course, the court will have to decide that.

Mr. Jones: That can be determined.

Mr. Merrill: Yes, by a thorough search of the constitution and by-laws.

The Court: That seems to be one of the questions to be put up to me. I have to decide that. I don't think that I should take his opinion on this matter. You are asking him now, what you are going to ask the Court. If the Constitution prescribe the duties of this financial secretary that would be the best evidence and I will have to read that. I will sustain the objection. [144]

Mr. Merrill: May I read the answer for the record.

The Court: Yes.

(Deposition of V. J. Pakes.)

A. The payment of the assessment or installments of assessment to the financial secretary.

Q. In the actual practice of the society, is the same thing true?      A. Yes.

The Court: You understand that if all of this is within the constitution I am not sustaining the objection.

Mr. Merrill: Now, for the purpose of clarity only, I will ask it again.

Q. As you understand the Constitution, laws and by-laws what governs the standing of a member,—the payment to the financial secretary, or the receipt of the assessment or installments of assessment by the secretary of the society?

A. The payment of the assessment, or installments of the assessment to the financial secretary.

Q. In the actual practice of the society, is the same thing true?      A. Yes.

Q. Would the fact that the financial secretary fail to make his remittance and camp report to the secretary of the society within the time required by the constitution, [145] laws and by-laws, have any effect upon the standing of an individual member of that camp, if he had in fact paid his installment to the financial secretary as required?

A. If he made the payment to the financial secretary of his camp, it would have no effect on his standing and the validity of his certificate.

(Deposition of V. J. Pakes.)

Mr. Merrill: Now, I go to page 36 of the deposition, the first question and answer was read into the record, under the redirect examination. I will start with the second question on the redirect examination.

Q. As I understand it then, you determine to whom the distribution is to be made from the records of the society as to the members who have paid their installments to a certain date; that is, you base that entirely upon the records as you receive them from the financial secretary.

A. That is correct.

Q. The dates of payment of Mr. Krussman have been testified and also a stipulation entered into as to the dates of these payments, some of which were paid after the last day of the month, and if it should develop that certain payments had been made after the last day of the month, and that Mr. Krussman had been suspended, although your records do not show that, what would be your practice in a case of that kind?

Mr. Jones: Objected to as calling for a conclusion of the witness based upon a hypothetical question. [146]

The Court: Overruled.

A. We would accept the payment and take it for granted the payment had been made in time.

Q. On that basis would you make the distribution?  
A. We would.



(Deposition of V. J. Pakes.)

Q. You have testified also that in making tender of refund of assessments to the beneficiary under the certificate of Mr. Krussman you deducted from the amount paid the sum of \$10.55 which was paid to him on February 1, 1940 as a distribution of savings and gains. Will you explain that deduction? The reason for it?

A. The deduction was simply made because of the fact that later on it was developed that Mr. Krussman was improperly or illegally reinstated.

Mr. Jones: We move to strike that as a conclusion of the witness that he was improperly and illegally reinstated.

The Court: Of course, counsel understands that this is not binding on the Court. That is one of the ultimate questions to be decided here. It may stand.

Q. Mr. Pakes was that because he did not pay the July installment of 1939 before the last day of that month?

A. You refer to the deduction of that amount?

Q. Yes. A. I would say it was.

Q. In other words, a person who becomes suspended before the [147] date upon which the distribution was made and remained suspended would not be entitled to the distribution for that particular year?

Mr. Jones: I shall have to object on the ground that it calls for a conclusion of the witness.

(Deposition of V. J. Pakes.)

The Court: As I have stated, this of course, is a matter that the Court will have to decide. I will permit it to go in for the present time. It is an opinion of the witness. I will admit it now subject to a ruling later on whether it should be stricken out. I have to hear you on this matter. I will permit it to go in with that understanding.

A. That is correct. He would not be entitled to a distribution.

Q. Do you base your records as to membership or suspension entirely upon the reports which you receive each month from the financial secretary?

A. We do.

Q. On cross examination you testified that from time to time it was reported by Bazil Flemming, the financial secretary of camp seven at Pocatello, Idaho, that Mr. Krussman had failed to pay his installments. Do you have a record of the times such reports were made? A. Yes we have.

Q. In addition to the reports themselves, did you as a part of your record have a card record showing those failures to pay? [148]

A. Yes, membership cards show such information.

Q. Mr. Pakes, I hand you card which has been marked exhibit 18. Is that the card record which you say you kept of the membership of Eric A. Krussman?

(Deposition of V. J. Pakes.)

A. That is correct. That is the membership card of Eric A. Krussman.

Q. Will you please explain the notations appearing thereon which you say indicate the months in which Mr. Krussman did not pay his installment during the month in which it was due in accordance with the report of the financial secretary?

A. This card shows the dates of delinquency, reinstatement etc., advance payments, also.

Q. Please state which monthly installments the card shows as not having been paid.

Mr. Jones: Objected to on the ground, first, that the card is not the best evidence, it was not the record of the financial secretary at Pocatello. Second; it is an attempt to show by testimony what the card shows without having it in evidence.

The Court: For the present the objection is sustained.

Mr. Merrill: We offer it in evidence at this time.

The Court: It may be admitted. [149]

A. The date of suspension is November 1, 1936, showing nonpayment of the October installment; June 1, 1937 for non-payment of May installment of 1937; and July 1, 1937 showing non-payment of June installment; August 1, 1937 indicating suspension for non-payment of July installment. Here is date of October 1, indicating suspension for non-



(Deposition of V. J. Pakes.)

payment of September installment, and here is August 1, 1939, date of suspension, indicating non-payment of July installment of 1939, and date of August 1, 1940, indicating suspension for non-payment of the July installment of 1940.

Q. What is the next line underneath?

A. The next line shows the date of reinstatement.

Q. Explain each of those notations.

A. December 1, 1936, shows that delinquent installment of October 1936 was paid and reinstatement is dated December 1, 1936; next date showing suspension of June 1, 1937 for non-payment of installment of May, reinstatement being dated July 1, 1937; July 1, 1937 suspension for non-payment of June installment shows a reinstatement on August 1, 1937, and August 1, '37 suspension for non-payment of July installment shows a reinstatement on October 1, '37; and October 1, 1937 suspension for non-payment of September installment, reinstatement was dated November 1, 1937; suspension of August 1, '39 for non-payment of July 1939 installment, reinstatement [150] was made on August 29, '39; suspension of August 1, 1940 for non-payment of July installment shows a reinstatement on August 9, 1940.

Q. Mr. Pakes, when you spoke about reinstatement, did you mean by that, that is an entry as to when you received payment of that installment, or about the time you received it?



(Deposition of V. J. Pakes.)

A. It is about the time. It is not the date of the actual receipt of the payment, except the last one, which was dated August 29, '39, which I believe is the actual date the payment was received here.

Q. Are the notations of reinstatement subject to conditions of reinstatement set out in the constitution, laws and by-laws to which you testified on direct examination?

Mr. Jones: Objected to on the same ground, that it is calling for a conclusion of the witness.

The Court: It goes in under the same ruling.

A. That is right.

Q. On cross examination, Mr. Pakes, you testified concerning a detailed report of the standing of members required and made by financial secretaries. Do you receive any other detailed statement than the regular monthly report with reference to which you have testified?

A. There were some special remittances which are slightly different than the regular report. Those are remittances that are received between the due dates of the [151] regular reports.

Q. Are the regular monthly reports which you have examined and testified concerning referred to as the detailed statements required? A. Yes.

Q. Do those reports always indicate the date upon which payments were made to the financial secretary?

(Deposition of V. J. Pakes.)

A. No, they do not indicate that information.

Q. Mr. Pakes, at the time you received these reports to which you testified, did you have any knowledge of the condition of the health of the members who were reported as having paid?

A. No.

Q. You have testified that certain installments have been made after the last day of the month, and in that connection has a member, or has he not, the right under the terms of the constitution, laws and by-laws to pay a monthly installment after the last day of the month?

Mr. Jones: Objected to as calling for a conclusion.

The Court: The same ruling.

A. He has.

Q. Under what conditions does he have the right to pay an installment after the last day of the month?

Mr. Jones: Objected to as calling for a conclusion.

The Court: The same ruling. [152]

A. He must be in good health.

Q. When a payment is made to the financial secretary after the last day of the month and remitted to the society, is that installment accepted by you as secretary of the society as if the member

(Deposition of V. J. Pakes.)

never had been suspended, or is it accepted as a payment for the purpose of reinstatement?

Mr. Jones: Objected to as calling for a conclusion of the witness.

The Court: The same ruling.

A. It is received for the purpose of reinstatement.

Q. You have previously testified concerning Section 65, may I ask if a member has failed to pay a monthly installment during the month in which it is due, and pays it within three months, such assessment or installment of assesment is accepted under your authority as provided in Section 65 of the constitution, laws and by-laws which is in evidence?

Mr. Jones: Objected as it asks for this witness's interpretation of what the constitution and by-laws are.

The Court: Ruling is reserved on that. The answer may go in at this time.

A. That is correct.

Q. You testified on cross examination that probably a number of members of Camp No. 7, Pocatello, Idaho, [153] paid installments after the last day of the month. Do you know if under any of the certificates issued by the Society there is any provision made for advancing installments for delinquent members from the cash surrender value of such certificate?

(Deposition of V. J. Pakes.)

A. Yes, under certain certificates there is such a provision.

Q. Was there any such provision in the certificate held by Mr. Krussman? A. No.

Q. If I understand your answer to the last two interrogatories, then it would not necessarily follow that because a person failed to pay an installment on the type of certificate mentioned that he would become suspended by reason of such failure, would it? A. No, it would not.

Q. If a person held a certificate providing for an automatic installment loan, and that person's certificate had a cash value, then the payment would be advanced by the society. A. It would.

Q. No suspension would result?

A. That is correct.

Q. And his failure to pay the monthly installment under such circumstances would not effect a suspension. Is that correct?

A. That is correct. [154]

Mr. Merrill: That is all we offer of the deposition.

The following read by Mr. Jones.

#### Recross Examination

Q. Mr. Pakes, were there any such certificates at the local camp in Pocatello, Idaho, which you have referred to?

A. Certificates with the automatic premium loans?



(Deposition of V. J. Pakes.)

Q. Yes. A. I am quite sure there were.

Q. Will you look at this one for April, 1940, and indicate which of those had such certificates?

A. This report does not indicate the type of certificate these members held.

Q. Can't you tell from the monthly rate?

A. Not exactly, not having the amount of insurance, the age of the member, I would not be able to tell from these rates the type of certificate held.

Q. You would not say any of them held such certificate on that report there?

A. I would say that as a general run they would not all be term certificates. Some would be ordinary life or some other type of insurance.

Q. Will you tell me what Ralph Bistline's certificate was?

A. No, without the office record I could not tell.

Q. If I understand you, Mr. Pakes, the defendant company [155] has no way of determining whether its members are in default?

A. Except from the monthly reports.

Q. You never make any inquiry to your financial secretary regarding that fact? A. No.

Q. In so far as the general officers of the Company, they pay no attention as to dates of checks that are sent in to the Company to pay installments?

A. We rely entirely on the monthly report the financial secretary sends us.

(Deposition of V. J. Pakes.)

Q. That is true, notwithstanding the fact that your financial secretary is instructed not to send check to the company in payment of installments?

A. There is not any direct instruction he shall not send in checks.

Q. Does not the financial secretary's report instruct him what to send?

A. Yes, but it does not say he should not send personal checks.

Q. It does list what he shall send?

A. Yes.

Q. It does not list personal checks?

A. It does not say anything about personal checks.

Q. Referring to plaintiff's exhibit 18, can you state whether such exhibits shows the July installment was [156] delinquent? A. It does.

Q. Does it show the August installment was delinquent? A. It does.

Q. Does it show that the September installment was delinquent? A. It does.

Q. Does it show that the October installment was delinquent?

A. It does not show the October installment was delinquent.

Q. You have no personal knowledge then as to who examined the checks that were sent in by Krussman? A. No.

Q. But they were received by the General offices for payment of his installment?

(Deposition of V. J. Pakes.)

A. They were.

Mr. Jones: The following agreement between counsel was the portion I wanted to read into the record yesterday.

The Court: The entire stipulation is in as an exhibit now.

Mr. Jones: That is all of the deposition.

Mr. Merrill: My attention was called to the fact that I overlooked offering exhibit 11 and I now offer it in evidence.

The Court: It may be admitted.

### DEFENDANT'S EXHIBIT No. 11.

853

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		(11.70 for #7)
Bazil Fleming		( .15 a camp)
Camp 7 Idaho		( ——— )
		(11.85 )
Krussman 39/7—Paid		

Basil Fleming F. S.  
236 No. 12'' St.  
Pocatello, Idaho

Pd	Dr	39-7	.21
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Special Remittance  
By G. P. B. Auditor

Ans—G. G. R.

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(not readable)

[254]

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Mr. Jones: I assume that we may refer to any part of the constitution in our arguments or briefs.

[157]

The Court: Either side may do that.

Mr. Merrill: We will agree to that.

Mr. Jones: We have had marked a stipulation plaintiff's exhibit 19, and we would like to have the clerk mark each of the checks, they are attached to this stipulation, with the same exhibit number as appears thereon at the present time.

The Court: Very well.

Mr. Jones: We now offer in evidence Plaintiff's exhibit 19, together with the exhibits attached thereto and referred to therein.

The Court: Admitted.



## PLAINTIFF'S EXHIBIT No. 19.

[Title of District Court and Cause.]

## STIPULATION

It Is Stipulated Between the plaintiff by his Attorney, T. D. Jones, and the Defendant by its Attorney, George Yeager, who is assistant to the General Attorney for the Defendant, that the facts herein set out, together with the Exhibits hereto attached and referred to herein may be introduced in evidence by either the Plaintiff or Defendant herein without further proof thereof:

That Exhibit G-1, being the check drawn by E. A. Krussman on May 12, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on May 15, 1936, and applied by Defendant in payment of the installment for the month of May, 1936.

That Exhibit G-2, being the check drawn by E. A. Krussman on June 15, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on June 16, 1936, and applied by defendant in payment of the installment for the month of June, 1936.

That Exhibit G-3, being the check drawn by E. A. Krussman on August 8, 1936, in favor of Pacific Woodmen, for the sum of \$24.10, was received by the defendant on August 10, 1936, and applied by defendant in payment of the installment for the months of July and August, 1936. [243]

That Exhibit G-4, being the check drawn by E. A. Krussman on September 10, 1936, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on September 14, 1936, and applied by defendant in payment of the installment for the month of September, 1936.

That Exhibit G-5, being the check drawn by E. A. Krussman on November 28, 1936, in favor of Bazil Fleming for Pacific Woodmen, in the sum of \$12.05, was cashed by him and the proceeds transmitted to the society, the defendant above named, and applied in payment of the installment for the month of October, 1936.

That Exhibit G-6, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on December 14, 1936, in favor of Bazil Fleming, in the sum of \$12.05, was cashed by Bazil Fleming, Financial Secretary of the above named defendant, and the proceeds transmitted to said defendant, and applied by defendant in payment of the installment for the month of November, 1936.

That Exhibit G-7, being the check drawn by E. A. Krussman on January 15, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on January 19, 1937, and applied by the defendant in payment of the installment for the month of December, 1936.

That Exhibit G-8, being the check drawn by E. A. Krussman on February 12, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on February 24, 1937, and applied by defendant in payment of the installment for the month of January, 1937.

That Exhibit G-9, being check drawn by E. A. Krussman on March 20, 1937, in favor of Pacific Woodmen, for the sum of \$12.05, was received by the defendant on March 22, 1937, and applied by defendant in payment of the installment for the month of February, 1937. [244]

That Exhibit G-10, being check drawn by E. A. Krussman on April 17, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on April 21, 1937, and applied by defendant in payment of the installment for the month of March, 1937.

That Exhibit G-11, being the check drawn by E. A. Krussman on May 17, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on May 18, 1937, and applied by defendant in payment of the installment for the month of April, 1937.

That Exhibit G-12, being the check drawn by E. A. Krussman on June 20, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on July 16, 1937, and applied by defendant in payment of the installment for the month of May, 1937.



That Exhibit G-13, being the check drawn by E. A. Krussman on August 3, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on August 10, 1937, and applied by defendant in payment of the installment for the month of June, 1937.

That Exhibit G-14, being the check drawn by E. A. Krussman on October 6, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 20, 1937, and applied by defendant in payment of the installment for the month of July, 1937.

That Exhibit G-15, being the check drawn by E. A. Krussman on October 14, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 20, 1937, and applied by defendant in payment of the installment for the month of August, 1937.

That Exhibit G-16, being the check drawn by E. A. Krussman on November 12, 1937, in favor of Pacific Woodmen for the sum of \$23.70, was received by the defendant on November 18, 1937, and [245] applied by defendant in payment of the installment for the months of September and October, 1937.

That Exhibit G-17, being the check drawn by E. A. Krussman on December 12, 1937, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on December 16, 1937, and applied by defendant in payment of the installment for the month of November, 1937.



That Exhibit G-18, being the check drawn by E. A. Krussman on January 17, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on January 20, 1938, and applied by defendant in payment of the installment for the month of December, 1937.

That Exhibit G-19, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on February 16, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on February 18, 1938, and applied by defendant in payment of the installment for the month of January, 1938.

That Exhibit G-20, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on March 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85 was received by the defendant on March 21, 1938, and applied by defendant in payment of the installment for the month of February, 1938.

That Exhibit G-21, being the check drawn by E. A. Krussman on April 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on April 18, 1938, and applied by defendant in payment of the installment for the month of March, 1938.

That Exhibit G-22, being the check drawn by E. A. Krussman for E. A. Krussman on May 14, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on May 17, 1938, and applied by defendant in

payment of the installment for the month of April, 1938. [246]

That Exhibit G-23, being the check drawn by Mrs. E. A. Krussman, for E. A. Krussman on June 16, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on June 17, 1938, and applied by defendant in payment of the installment for the month of May, 1938.

That Exhibit G-24, being the check drawn by E. A. Krussman on July 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on July 21, 1938, and applied by defendant in payment of the installment for the month of June, 1938.

That Exhibit G-25, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on August 10, 1938, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on August 18, 1938, and applied by defendant in payment of the installment for the month of July, 1938.

That Exhibit G-26, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on September 19, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on September 23, 1938, and applied by defendant in payment of the installment for the month of August, 1938.

That Exhibit G-27, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on

October 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on October 17, 1938, and applied by defendant in payment of the installment for the month of September, 1938.

That Exhibit G-28, being the check drawn by E. A. Krussman on November 15, 1938, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on November 17, 1938, and applied by defendant in payment of the installment for the month of October, 1938.

That Exhibit G-29, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on December 16, 1938, in favor of Morris Sheppard, Secy. P. Woodmen, for the sum of \$11.85, was [247] received by defendant on December 22, 1938, and applied by defendant in payment of the installment for the month of November, 1938.

That Exhibit G-30, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on January 13, 1939, in favor of Morris Sheppard, Secy. Pacific Woodmen, for the sum of \$11.85, was received by the defendant on January 20, 1939, and applied by defendant in payment of the installment for the month of December, 1938.

That Exhibit G-31, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on February 18, 1939, in favor of Pacific Woodmen, for the sum of \$11.85, was received by



the defendant on February 20, 1939, and applied by defendant in payment of the installment for the month of January, 1939.

That Exhibit G-32, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on March 18, 1939, in favor of Pacific Woodmen, for the sum of \$11.85, was received by the defendant on March 23, 1939, and applied by defendant in payment of the installment for the month of February, 1939.

That Exhibit G-33, being the check drawn by E. A. Krussman on April 15, 1939, in favor of W. O. W., for the sum of \$11.85, was received by the defendant on April 18, 1939, and applied by defendant in payment of the installment for the month of March, 1939.

That Exhibit G-34, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman, on May 17, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on May 19, 1939, and applied by defendant in payment of the installment for the month of April, 1939.

That Exhibit G-35, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on June 15, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on June 19, 1939, and applied by defendant in payment of the installment for the month of May, 1939. [248]

That Exhibit G-36, being the check drawn by E. A. Krussman on July 18, 1939, in favor of



Morris Sheppard, for the sum of \$11.85, was received by the defendant on July 19, 1939, and applied by defendant in payment of the installment for the month of June, 1939.

That Defendant's Exhibit 12, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on August 24, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on August 28, 1939, and applied by defendant in payment of the installment for the month of July, 1939.

That Exhibit G-38, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on September 16, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on September 19, 1939, and applied by defendant in payment of the installment for the month of August, 1939.

That Exhibit G-39, being the check drawn by E. A. Krussman on October 18, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on October 23, 1939, and applied by defendant in payment of the installment for the month of September, 1939.

That Exhibit G-40, being the check drawn by Mrs. E. A. Krussman for E. A. Krussman on November 17, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on November 20, 1939, and applied by defendant in payment of the installment for the month of October, 1939.

That Exhibit G-41, being the check drawn by Beatrice Ginzel for E. A. Krussman on December 16, 1939, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on December 18, 1939, and applied by defendant in payment of the installment for the month of November, 1939.

That Exhibit G-42, being the check drawn by Beatrice Ginzel for E. A. Krussman on January 19, 1940, in favor of [249] Morris Sheppard, for the sum of \$11.85, was received by the defendant on January 22, 1940, and applied by defendant in payment of the installment for the month of December, 1939.

That Exhibit G-43, being the check drawn by Beatrice Ginzel for E. A. Krussman on February 17, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on February 21, 1940, and applied by defendant in payment of the installment for the month of January, 1940.

That Exhibit G-44, being the check drawn by Beatrice Ginzel for E. A. Krussman on March 18, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on March 19, 1940, and applied by defendant in payment of the installment for the month of February, 1940.

That Exhibit G-45, being the check drawn by Beatrice Ginzel for E. A. Krussman on April 15, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant

on April 18, 1940, and applied by defendant in payment of the installment for the month of March, 1940.

That Exhibit G-46, being the check drawn by Beatrice Ginzel for E. A. Krussman on May 21, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on May 22, 1940, and applied by defendant in payment of the installment for the month of April, 1940.

That Exhibit G-47, being the check drawn by Beatrice Ginzel for E. A. Krussman on June 18, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on June 20, 1940, and applied by defendant in payment of the installment for the month of May, 1940.

That Exhibit G-48, being the check drawn by Beatrice Ginzel for E. A. Krussman on July 17, 1940, in favor of Morris Sheppard, for the sum of \$11.85, was received by the defendant on July 19, 1940, and applied by defendant in payment of the installment for the month of June, 1940. [250]

That Exhibit G-49, being the check drawn by Beatrice Ginzel for E. A. Krussman on August 1, 1940, in favor of Morris Sheppard, for the sum of \$23.70, was received by the defendant on August 8, 1940, and applied by defendant in payment of the installments for the months of July and August, 1940.



It is agreed that the monthly rate of installment on the certificate of Eric A. Krussman was \$11.70, and that whenever a monthly payment in excess of \$11.70 was paid, the amount in excess of \$11.70 was credited back to Bazil Fleming, Financial Secretary of Camp No. 7 at Pocatello, Idaho, to be applied on Mr. Eric A. Krussman's local camp dues.

It is further agreed that all of the checks referred to in the Stipulation were duly endorsed by the defendant Society, with the exception of Exhibits G-6 and G-7, and all of said checks and payments were delivered to Bazil Fleming, Financial Secretary of Camp No. 7, Pocatello, Idaho, and by him forwarded to the Secretary of the defendant.

Dated this 22nd day of August, 1941.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff

Residence and Post Office

Address: Pocatello, Idaho.

RAINEY T. WELLS

By GEORGE YEAGER

GEORGE YEAGER

Attorneys for Defendant

Residence and Post Office

Address: Omaha, Nebraska.

[Endorsed]: Filed Oct. 15, 1941. [251]



Mr. Jones: I desire at this time to read this into the record, we have offered exhibit 19 together with exhibits marked as follows: First, may it be understood that the reporter can copy this into the record to save time here.

The Court: Yes, if it is agreed.

Mr. Merrill: I don't see any necessity of that.

Mr. Jones: I want to have it before the Court.

The Court: It has been admitted, it is before the Court now.

Mr. Jones: The exhibits which are attached and to which I refer are marked exhibits G-1 to g-49 both inclusive.

The Court: Very well. [158]

Mr. Jones: I understand they are all in evidence.

The Court: Yes, I have ruled twice on that.

Mr. Jones: I want to be sure they are in the record.

The Court: So far as this record is concerned it is all in. I have ruled twice now.

BEATRICE GINZEL

Being called as a witness on behalf of the plaintiff,  
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. State your name? A. Beatrice Ginzel.

Q. You are a daughter of the late Eric A.  
Krussman? A. I am.

Q. Where were you living prior to and at the  
time of his death. With reference to where he was  
living. A. At the same place.

Q. How long had you been living there?

A. About a year and a half.

Q. Were you acquainted with Basil Flemming?

A. Yes sir.

Q. The financial secretary of the defendant in  
this case. A. Yes sir.

Mr. Merrill: Object to the statement that he  
[159] financial secretary of the defendant. He  
was the secretary of the local camp and not of  
of the defendant company.

Mr. Jones: I suppose the Court will decide  
that question.

The Court: You are asking this witness to  
testify as to his capacity. Sustained.

Q. You were acquainted with Basil Flemming?

A. Yes sir.

Q. You may state whether or not you saw him  
come to the place where your Father and you were  
living at any time prior to your father's death?

(Testimony of Beatrice Ginzel.)

Mr. Merrill: Objected to as immaterial  
The Court: Overruled.

A. Yes sir, he came every month to collect.

Q. Collect what?

A. The payment on his insurance.

Q. Do you remember when your Father was stricken with the stroke?           A. In July 1938.

Q. Do you know whether from that time on that Mr. Flemming came to the house to collect the dues or assessments?           A. Yes sir.

Mr. Merrill: I make the same objection here as to the fact that it is immaterial as to what knowledge Bazil Flemming may have had, it is not imputed [160] to the defendant and would not bind the defendant.

The Court: She may answer. I see this is one of the questions that I have to dispose of and I will allow it and reserve ruling at this time. If I find that it is improper I will strike it. We will take the testimony now.

Q. Were you there from the time of his first illness in July 1938?           A. No sir.

Q. Would you know as to Mr. Flemming coming to collect during the time you were not there?

A. No sir.

Q. What time did you know that Bazil Flemming came to the house to collect the monthly installments?

(Testimony of Beatrice Ginzel.)

A. I was there for nearly two months after he was sick and then back off and on at different times until we came back to stay.

Q. The Court wants to know when you were there.

A. I came back in November,—November 27, 1939.

Q. Were you there steadily after that?

A. All of the time.

Q. That was the period that you knew that he came? If you were there, then that is the period you knew that he came, is that true?

A. Yes, sir.

Q. Do you know who drew the checks when he came there? [161]

Mr. Merrill: That is objected to as immaterial, the checks would be the best evidence.

The Court: Overruled.

A. Yes.

Q. Who.           A. I did.

Q. All of them?

A. From the time I came back in November.

Q. You may state whether or not Mr., Krussman, your father, was present when Mr. Flemming would come?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. Yes, Dad was present.

Q. Do you know whether any discussion was ever had between Bazil Flemming and your Father



(Testimony of Beatrice Ginzel.)

with reference to your father's condition at any time?

Mr. Merrill: Objected to as immaterial and incompetent for any purpose.

The Court: Overruled.

A. Yes sir, they did.

Q. You may state generally what was said about his health.

Mr. Merrill: Objected to, it would be hearsay, incompetent, irrelevant and immaterial.

The Court: I am reserving ruling on the authority and conduct of this secretary, for the time being I will overrule this objection.

[162]

Mr. Merrill: I object further that there is no time or place fixed, no foundation laid.

The Court: Probably the time and place should be fixed.

Q. I will ask you if you know when the checks that you wrote were dated with reference to the time Mr. Flemming would call?

A. On the date he called.

Q. Was that true in every instance?

A. Yes sir.

Q. When would these conversations be held between your Father and Mr. Flemming with reference to his state of health?

A. On the date he came for the checks.

(Testimony of Beatrice Ginzel.)

Q. Do you observe from exhibit 19, and the exhibit attached as G 41 and can you tell who wrote that check?      A. I did.

Q. What date was it?

A. December 16, 1939.

Q. Can you state whether Mr. Flemming was there at that time or not?      A. Yes, he was.

Q. When would these conversations occur between your Father and Mr. Flemming with reference to the health of your father.

A. When he came to get the checks. [163]

Q. What was said at any of those times?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid and hearsay.

The Court: I am reserving ruling. She may answer at this time.

A. He would ask how he was,—how he was feeling and they would have a general discussion about his health, they would sit and talk for half an hour and sometimes longer.

Q. In examining exhibit 19 and the exhibits attached to it, can you tell when you first started to write checks to Mr. Flemming?

Mr. Merrill: Counsel has apparently discontinued the examination touching the health of her father and I move that everything the witness has testified to in that regard be stricken because it is incompetent, irrelevant

(Testimony of Beatrice Ginzel.)

and immaterial and hearsay, and for the further reason that there has been given no facts or information touching his health. It may have been good or bad.

The Court: I am reserving ruling on the motion to strike out the testimony  
(no answer to the question asked)

Q. After your father had the stroke in 1938 in July, when was the first time you knew Basil Flemming, or saw him.

A. The next day. [164]

Q. Where was your father at that time?

A. In bed.

Q. What was his condition, generally?

A. He was sick.

Q. You may state if there was any portion of his body that was affected, that would be observed by anybody?

A. Yes, his right arm and leg that could be easily seen.

Q. Did he improve after the stroke?

A. Yes sir.

Q. Did he remain at home after that?

A. No sir.

Q. Where did he go?

A. He came to Nampa, Caldwell and went to Seattle twice.

Q. Do you know whether he was driving in a car?

(Testimony of Beatrice Ginzel.)

A. Yes sir, he had a permit to drive.

Q. You say that you first came to the home, when, that is to stay steadily?

A. November the 27th.

Q. You had been there between your father's stroke and that time?           A. Yes sir.

Q. Where were you living before you went there to stay with him permanently?

A. We came from Caldwell.

Q. Did you at the time you were living there,—prior to the time you lived there permanently, see Mr. Flemming [165] receive any check from the house?           A. I don't remember that.

Mr. Jones: That is all.

### Cross Examination

By Mr. Merrill:

Q. Mrs. Ginzel, I think you said your Father,—strike that please,—. In view of your Honor's ruling or reserved rulings, I feel that I should cross examine and I want to do so without prejudice at this time.

The Court: Certainly.

Q. Mrs. Ginzel, you stated that *you* father sustained a paralytic stroke?           A. Yes sir.

Q. In July 1938?           A. Yes sir.

Q. What time in July did he have that stroke?

A. I think it was the 20th.

Q. Where was he at that time?

A. Out on the lawn.



(Testimony of Beatrice Ginzel.)

Q. Where was he living at that time?

A. At the Riverview.

Q. What do you mean by that?

A. At his home.

Q. That is the hotel apartment on the river bank here in Pocatello?

A. Yes sir. [166]

Q. He was the owner of that property and was operating it at the time he took this stroke?

A. Yes sir.

Q. Where were you living?

A. I was at Nampa.

Q. You came down immediately.

A. I had been down and went home the day before.

Q. And came back.

A. Yes sir.

Q. When did you get here after your Father's stroke?

A. The next afternoon.

Q. How long did you remain?

A. Until school started in September.

Q. During all of that time, he was confined to his bed.

A. Not all of that time, he was up and took a few steps before I went home.

Q. He suffered a paralytic stroke?

A. Yes sir.

Q. On his right side.

A. Yes sir.

Q. How long was he unconscious?

A. About a week.

Q. His speech was affected?

A. Yes sir.

Q. His general condition was seriously affected?

[167]

(Testimony of Beatrice Ginzel.)

A. Yes sir.

Q. He never fully recovered?

A. Yes, I think he did.

Q. His right arm never recovered?

A. He got so he could write with it.

Q. It was always drawn up? A. No sir.

Q. He limped always?

A. He walked with a limp.

Q. His leg was affected?

A. He got around on it.

Q. He used a cane and crutches. A. No.

Q. He used a cane considerable. A. No.

Q. He limped. A. He limped a little.

Q. He suffered another stroke. A. Yes sir.

Q. When was that stroke?

A. In July 1940.

Q. He never recovered from that.

A. No sir.

Q. He died a few days later?

A. A few weeks later.

Q. About August the second. [168] A. Yes.

Q. He took the second stroke July 24, 1940.

A. Around there.

Q. Was he in the hospital at any time?

A. No sir.

Q. Always at the Riverview Hotel?

A. Yes sir.

Q. If he wasn't in a crippled condition Mr. Flemming would never notice anything.

A. Yes he could tell.

(Testimony of Beatrice Ginzel.)

Q. Tell what?

A. Tell by his arms and legs that he had been affected.

Q. Every time Mr. Flemming came over, by looking at your father you could tell he was sick.

A. No sir.

Q. Did he talk about his health with Mr. Flemming always?

A. I don't know that he always did, but sometimes he did.

Q. When Mr. Flemming came to see your father he could tell he was sick, do you mean that?

A. Yes sir.

Q. That was every time he came, he could tell he was sick?

A. Dad wasn't there all of the time?

Q. Every time he was there Mr. Flemming could tell he was sick?

A. Yes, I think so.

Mr. Merrill: That is all [169]

### Redirect Examination

By Mr. Jones:

Q. Mr. Merrill asked if your father owned the Riverview hotel.

A. Yes, he did.

Q. It was heavily mortgaged wasn't it?

Mr. Merrill: Objected to as immaterial.

Mr. Jones: This question was asked for the purpose of showing that he owned this property, now I want to show the actual condition.

(Testimony of Beatrice Ginzel.)

Mr. Merrill asked, was he the owner of this property.

The Court: There was an answer given here.

Mr. Jones: He lived at the property, that's true.

The Court: What difference does it make to the issues here. I don't understand that it could make any difference what property he owned. Sustained.

Q. Did I understand you to say that Mr. Fleming could always tell about your Father's improvement, and when he came there, by looking at him he could tell that he was still sick?

A. Yes, I think so.

Mr. Jones: That is all

Mr. Merrill: Yes, that is all.

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## MARION KRUSSMAN

Being called as a witness on behalf of the [170] plaintiff, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Jones.

Q. State your name?

A. Marion Alice Krussman.

Q. How old are you?                      A. Sixteen.

Q. You are the daughter, the youngest daughter of Eric A. Krussman?                      A. Yes, sir.



(Testimony of Marion Alice Krussman.)

Q. Where were you living when your father first became sick, Marion?

A. At the same place he was, at the Riverview.

Q. Were you there at the time he was first afflicted?      A. Yes, sir.

Q. When was it?

A. That was in July, about the 20th, 1938.

Q. When did you see him first after he was afflicted?

A. Just as immediately as we discovered it.

Q. Do you know whether, what his mental condition was right after his stroke?

Mr. Merrill: Objected to as calling for a conclusion of the witness and no foundation is laid and it is improper examination.

Mr. Jones: They brought out that he was [171] in a coma for a week.

The Court: Overruled.

A. Mentally he was just the same, I remember he wasn't in a coma, he wasn't unconscious. They gave him hypos to put him to sleep.

Q. Did you talk to him right after?

Mr. Merrill: Objected to that would be hearsay incompetent, and immaterial for any purpose.

The Court: She may answer.

A. Yes, sir.

Q. Did you live there at the apartment with your Father from that time on?

A. Yes sir, I did.

(Testimony of Marion Alice Krussman.)

Q. Where had you been living prior to that time?      A. The same place.

Q. Did you know Mr. Basil Flemming?

A. Yes, I did.

Q. Where did you first get to see or know him?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Jones: It is preliminary.

A. He came monthly to collect the insurance money.

Mr. Merrill: Move to strike the answer as not responsive.

The Court: It may be stricken.

Q. You may state where you first began to know Mr. Flemming? [172]

A. At our home.

Q. Do you know whether he came there from time to time?      A. Yes sir.

Q. State what he came for?

Mr. Merrill: That calls for a conclusion of the witness and is incompetent, irrelevant and immaterial for any purpose.

The Court: Ruling reserved.

A. He came for the purpose of collecting the insurance monthly payments.

Q. Do you know whether he did collect them?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. Yes sir he did collect them.

(Testimony of Marion Alice Krussman.)

Q. In what form were they paid or handed to him?       A. Personal check.

Q. Did you ever make any of these checks yourself?

A. Yes sir, I recall making the face of two of the checks and Father would sign them.

Q. Handing you exhibit 19 can you go over them and state which two checks you made?

A. These two (indicating)

Q. Just name them by the exhibit number.

A. Exhibit G 28 and G 36.

Q. You made those two checks. [173]

Mr. Merrill: Objected to leading and repetition.

The Court: It may be leading, sustained.

Q. State what you know about these two checks. What you know about them?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

Q. To whom were they given.

A. One in 1938 and one in 1939. I wrote the face of both of them on Father's checks.

Q. What dates?

A. November 15, 1938 and July 13, 1939.

Q. Do you know what became of those two checks that you testified about?

Mr. Merrill: Objected to as calling for a conclusion and is one of the questions for the Court.

The Court: I will reserve ruling.

(Testimony of Marion Alice Krussman.)

A. I was there and I wrote them and my father signed them and he gave them to Mr. Flemming both times for payment of the policy.

Q. After the first stroke describe his condition as you saw it from that time on?

A. He was confined to his bed at first for a month or six weeks and then he sat up. He improved so he could walk and then he wrote some, and he liked to drive and the Doctor gave him a permit and he secured a license to drive. He drove his car for his own amusement. He [174] did improve a great deal. I was very close to my Father.

Mr. Merrill: I move to strike that part as to her father improving a great deal as being a conclusion, and as to the Doctor giving permission to drive as a conclusion and not the best evidence.

The Court: Motion granted as to the permit unless she knows.

Q. Were you there when this Doctor was with him and gave permission to get a license?

A. I was with him when he got the license. He had to have the Doctor's permit to get it.

Mr. Merrill: Move to strike that last portion of that answer.

The Court: It may be stricken.

Q. You may state how often you saw Mr. Fleming come to your home during the period that you have testified to.



(Testimony of Marion Alice Krussman.)

A. After the stroke.

Q. Did you see him before?

A. Yes sir, I saw him off and on, I cannot say how many times. After the stroke I have the proof of two times by the checks and I saw him other times but often when he was there I could have been in school.

Q. You were attending school?

A. Yes sir.

Q. After your father had the stroke I will ask you if he [175] wrote any checks and which they were?

Mr. Merrill: Objected to as calling for a conclusion and no foundation laid.

Mr. Jones: Withdraw it.

Q. Do you know your Father's signature?

A. Yes sir.

Q. Referring to exhibit 19, at dates subsequent to the date of your father's stroke, state if you observe any of those checks having been signed or written by him?

Mr. Merrill: There is no charge that anyone was forging these checks, and all this is immaterial.

The Court: Overruled.

A. Exhibit 33,—G 33 was written by father, the face and signature, the whole check, and exhibit 99.

Q. That was since the stroke.

A. Yes sir. There was just this once that I wrote them and he signed it.

(Testimony of Marion Alice Krussman.)

Mr. Merrill: I don't think that counsel should coach the witness.

Mr. Jones: She doesn't need any coaching.

A. He wrote these G 33 and 39 and signed the two that I wrote G 28 and G 36.

Q. Do you know whether he ever left home after he had the first stroke?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled. [176]

A. Yes sir, he went to Seattle, Washington, twice and on short trips. We took a vacation through the Yellowstone Park. He did all the driving then.

Q. Were you accompanying him?

A. Yes sir.

Mr. Jones: You may take the witness.

### Cross Examination

By Mr. Merrill:

Q. Your mother was Marie.

A. Segrid Marie.

Q. She wrote a number of those checks?

A. Yes sir.

Mr. Merrill: That is all.

Mr. Jones: That's all.

## WILLIAM FLEMMING

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Jones:

Q. State your name please?

A. William Flemming.

Q. Where do you live, in what town?

A. Pocatello.

Q. How long have you lived here?

A. Twenty-six years. [177]

Q. Who was your father?

A. Bazil Flemming.

Q. Where is he?           A. Deceased.

Q. When did he die?       A. December 1940.

Q. Do you know whether he was financial secretary of the defendant Company.

Mr. Merrill: Object to that form of question——

Mr. Jones: —Withdraw it.

Q. Do you know if he had anything to do with the business of the Omaha Woodmen Life Insurance Society?

Mr. Merrill: Objected to as calling for a conclusion of the witness, and he is incompetent to answer such a question.

The Court: That is pretty general. The objection is sustained.

(Testimony of William Flemming.)

Q. Is he the Bazil Flemming referred to in this case?      A. Yes sir.

Q. Do you know anything about the work he did as financial secretary?

Mr. Merrill: Objected to as immaterial and incompetent, and not the best evidence, also it calls for a conclusion of the witness.

The Court: Overruled, if he knows.

Mr. Merrill: The last part of the question, [178] where reference is made to financial secretary, that calls for a conclusion of the witness.

The Court: Unless he knows that he was the financial secretary.

Q. Do you know that he was?

A. Yes sir.

Q. Where were living at the time your father died, and before your father died, what place in Pocatello?      A. At his home, before he died.

Q. Up until when.

A. Until the last of July 1940.

Q. Was that about the time that Mr. Krussman died, if you know?      A. Yes sir.

Q. Did you do any of the work in connection with the collections for your father as financial secretary?

Mr. Merrill: Objected to as being immaterial for any purpose.

The Court: Overruled.



(Testimony of William Flemming.)

A. Yes, I would make the collections when Father was busy at his job.

Q. Did you ever make any collection from Mr. Krussman mentioned in this case?

Mr. Merrill: Objected to as wholly immaterial and incompetent for any purpose.

The Court: Overruled. [179]

A. Yes sir.

Q. State to the Court what you did?

Mr. Merrill: The same objection. This man was not the financial secretary.

The Court: He says he was assisting his father in making the collections.

Mr. Merrill: There could not be any connection.

Q. Did you assist your father in connection with the policy that is sued on in this action?

Mr. Merrill: We make the same objection.

The Court: Overruled. Did you make any collections?

A. Yes sir.

Q. State what you did.

Mr. Merrill: The same objection.

The Court: The same ruling.

A. I would go around to the members and collect their insurance.

Mr. Merrill: We object now as being immaterial for any purpose. It is incompetent, and it is not responsive.

(Testimony of William Flemming.)

Q. You can limit it to Mr. Krussman.

The Court: Overruled.

A. Collections were made about the 15th of the month.

Mr. Merrill: I move to strike that as not responsive. [180]

The Court: Just answer the question.

A. I made collection at the Krussman home.

Q. How were they paid?

A. By check.

Q. What did you do with the check?

A. My father usually made a report, and I would put the check in an envelope and mail them.

Q. You say that your father made the reports.

A. Yes sir.

Q. And you saw him making these reports?

Mr. Merrill: Objected to as leading.

The Court: Objection sustained.

Q. Did you see your father do anything in regard to making reports?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. Yes sir.

Q. What did you see him do?

A. I saw him making up the reports and he would write receipts for me to give the members.

Q. Was any receipt written to you for Mr. Krussman?           A. Never.

(Testimony of William Flemming.)

Q. How did you say the Krussman checks would be handled.

Mr. Merrill: Objected to as repetition and incompetent.

The Court: He may answer. [181]

A. They were put in the envelope with the report and mailed.

Q. Do you know what the general practice and custom of the members generally here in Pocatello was as to pay the assessments?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose. No foundation is laid for any such question and it has no bearing on this case.

The Court: Sustained.

Q. You may state if you know,—withdraw that,—state to the Court if you know, when the collections would be made each month and for what installment that would be collected?

Mr. Merrill: Objected to as repetition and upon the further ground that it is too general and not confined to the case at hand. He has previously testified and the checks will show the dates.

The Court: Do you confine it to this case?

Mr. Jones: Yes, to this case, Your Honor.

The Court: Overruled.

Q. The Krussman collection, I will confine it to that.

(Testimony of William Flemming.)

A. The collections were always made the month following the month in which the payments came due.

Q. What time in the month, generally, would the report for the previous month be sent in?

A. Around the 15th of the month. [182]

The Court: Sent where.

A. To the office at Omaha.

Q. That is the home office. A. Yes sir.

Q. That would be mailed out of here about when?

Mr. Merrill: Objected to as repetition.

The Court: Sustained, he said about the 15th of the month.

Q. You may state what the general practice and custom of your father was as you knew it in regard to the collection from the other members in Pocatello as to the time the collections were made and for what installments?

Mr. Merrill: Objected as incompetent, irrelevant and immaterial for any purpose and no foundation is laid, and also it calls for a conclusion of the witness.

The Court: I will reserve ruling on that. There is some question on this. If I find it is incompetent, I will strike his testimony on that.

A. There were several members that collections were made in the same manner as Mr. Krussman's



(Testimony of William Flemming.)

collections were made. That is, in the month following the month in which they were due.

Q. How many times would you say,—about how many times did you make these collections for your father?

Mr. Merrill: Objected as immaterial unless it [183] is confined to this case.

The Court: Do you confine it to this case?

Mr. Jones: Yes; first to this case.

The Court: Overruled.

A. Approximately every other month.

Q. For what period of time?

A. With Mr. Krussman it would be about 1935, since 1935.

Q. Every other month since that time.

A. Yes, the type of work my father was engaged in, some weeks on the 15th he would be working and the next month he would be off. If he was off he made the collections personally, and if he was working I would make the collection.

Q. Did you do any of the collection in 1940?

A. Yes sir.

Q. That is the year Mr. Krussman died?

A. No, that was in 1939,—I didn't make any in 1940.

Q. How long did the practice continue about making the collections as you indicate?

(Testimony of William Flemming.)

A. As far back as I can remember they were the same.

Mr. Merrill: You mean him making them sometimes and his father sometimes.

Q. You made them sometimes and your father sometimes.

A. That has been about ten years.

Q. Was that the general practice you followed at that time?

Mr. Merrill: Objected to as immaterial for any purpose, and leading. [184]

The Court: Sustained.

Q. You may state whether or not the collections were made during the time you helped him about in the manner you have indicated?

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: What collections are you talking about now.

Mr. Jones: From members in this locality.

Mr. Merrill: Objected to as immaterial for any purpose whatever.

The Court: I will reserve ruling.

A. Yes sir.

The Court: We will recess until 2 o'clock P.M.

(Testimony of William Flemming.)

October 23, 1941, 2 P. M.

Q. Mr. Flemming I call your attention to what has been marked as exhibit 19 and all the exhibits attached to that, and particularly to exhibit marked G 17 and ask you if you know whose hand writing is on the top of the check?

A. Yes, that is in the hand writing of Mr. Bazil Flemming.

Q. Your Father? A. Yes sir.

Q. What is that writing on that?

Mr. Merrill: Objected to as it speaks for itself. [185]

Mr. Jones: I call to the Court's attention the fact that this check being one admitted in evidence shows at the top of the check in the hand writing of Bazil Flemming "for number 11 report Nov. "

Mr. Merrill: Now I move that remark be stricken, he cannot tell what it is for. This witness says it is in his father's hand writing.

The Court: That is as far as he has gone yet.

Q. I call your attention to exhibit G 18, a check payable to Pacific Woodmen by Mr. Krussman or someone in his behalf, on which there is some hand writing at the top of the check "for number 12 installment" do you know whose hand writing that is?

Mr. Merrill: Objected to as immaterial.

The Court: If he knows, overruled.

(Testimony of William Flemming.)

A. That is my father's hand writing.

Q. Can you state how these installments were numbered each year?

Mr. Merrill: Objected to as incompetent. He was not the financial secretary.

The Court: Would not the record show how they were numbered.

Mr. Jones: They may but I see no harm in his stating if he knows.

The Court: If there is a record he would have to see the record and testify from that.

[186]

Q. On the first exhibit I showed you, being exhibit G 17 the portion of the top of the check reads for number 11 report November, that is the check dated December 12, 1937, and payable to the Pacific Woodmen? A. Yes sir.

Q. Do you know what number 11 report would be?

Mr. Merrill: Objected to as calling for a conclusion of the witness. Also there is no foundation.

The Court: Is the report in evidence?

Mr. Merrill: It would be a conclusion on his part at best.

The Court: Yes, the report is the best evidence.

Mr. Jones: We examined from these reports without objection.



(Testimony of William Flemming.)

Mr. Merrill: That was Mr. Pakes, and not this witness.

Q. I show you exhibit 15 being a letter as follows: Addressed Mr. Bazil Flemming, Pocatello, Idaho,——

Mr. Merrill: Objected to as this exhibit is in evidence and it speaks for itself.

The Court: Yes, it is in evidence, but the objection is overruled, he can examine as to the exhibit.

Q. Dear Sir, Referring to certificate T E 1321001, policy in the name of Eric A. Krussman, I wish at this time to change the beneficiary from Marion Alice Krussman to my [187] son, Harry E. Krussman. I will appreciate your attention to this immediately. I am herewith turning over to you my certificate T E 1321001 and would appreciate your attention to the matter at your earliest possible convenience. Sincerely yours, E. A. Krussman. Acknowledging certificate T E 1321001 for which I hereby receipt for receiving same. Bazil Flemming. It is understood that this change of beneficiary is now in effect. Bazil Flemming.” and there is a stamp “received August 8, 1940, Claim Department”

Do you recognize the signature of Bazil Flemming? A. I do.

Q. Whose signature is that?

A. My father's.

(Testimony of William Flemming.)

Q. Did you see that exhibit 15 in the possession of your Father?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. I did see this letter, Mr. Krussman came over and visited Father and talked to him about this matter. When Mr. Krussman left, my Father said to me——

Mr. Merrill: —Now we object to this as it would be hearsay.

The Court: Yes, he is about to testify as to what his father told him. Sustained. [188]

Q. Did you ever see it in the possession of your Father?

Mr. Merrill: Objected to as immaterial and repetition.

The Court: Sustained.

Q. When did you see it in possession of your Father?

Mr. Merrill: Objected to as immaterial.

The Court: Overruled.

A. My father showed that letter at this conversation I was about to tell you, he showed me this letter then.

Q. When? A. After Mr. Krussman left.

Q. When was that?

A. That was just before he left on his vacation in July.

(Testimony of William Flemming.)

Q. What year? A. 1940.

Q. Were you ever in the presence of your Father when he made these monthly reports that were transmitted to the society?

A. Yes sir, I was there several times.

Mr. Jones: You may examine, that's all.

### Cross Examination

By Mr. Merrill.

Q. Where are you living?

A. At present I am not living at home,—348 North 9th.

Q. Are you in Pocatello? A. Yes, sir.

[189]

Q. How old are you? A. Twenty-six.

Q. You have been collecting some of these premiums about ten years? A. Yes, sir.

Q. Prior to 1940? A. Yes, sir.

Q. So you would commence that when you were about fifteen? A. Yes, that's right.

Q. How many times between July 1938 and August 1940 did you collect at Mr. Krussman's home, at the Riverview Hotel, personally?

A. I didn't collect in 1940, I did in 1938 and 1939. I would say about twelve times in the two years.

Q. What is your occupation at the present time? A. Electrician.

Q. Are you connected with this Company in any way? A. No sir.

(Testimony of William Flemming.)

Q. Have you been since your father died?

A. No sir.

Q. How many people in Pocatello, or in the local camp number seven, carry insurance or had insurance during that time?

A. I am not sure as to the exact number.

Q. Approximately. A. Six or seven. [190]

Q. That carried insurance?

A. At the present time?

Q. No, during the period of time that you said that you would go and collect for your Father when he was financial secretary for the local camp. How many people in the local camp had insurance?

A. I can't say, but I can tell how many I collected from.

Q. Did you collect from delinquents or from everybody?

A. Those that didn't call to pay their dues.

Q. Do you have any idea how many had insurance at the local camp? A. Maybe twelve.

Q. All types of insurance? A. I can't say.

Q. You attempted to collect from those who hadn't paid?

A. No sir, that wasn't it.

Q. Those that were delinquent?

A. No that was not it, for the current report to be sent out.

Q. Then they were not all delinquent?

A. No sir.



(Testimony of William Flemming.)

Q. A few delinquents?

A. Maybe there would be some delinquents.

Q. You testified that there were some delinquents, can you tell how many?      A. No sir.

[191]

Q. Not all delinquents that you collected from?

A. No sir.

Q. Occasionally you collected from a delinquent?

A. Yes sir.

Q. That is what you meant when you said that you collected delinquent installments?

A. I had no way of telling whether the installment was delinquent, sometimes a member paid for two months, that would usually be for one delinquent.

Q. When you collected from Mr. Krussman, you didn't know that they were delinquent?

A. They were not delinquent that I know of.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Jones.

Q. Calling your attention to the statement that you collected in a month for the installment due the month previously,—

Mr. Merrill: —Objected to as leading and not proper, he has been interrogated on direct examination on this very matter.

The Court: Overruled.

Q. What is the fact as to what you did?

(Testimony of William Flemming.)

A. I don't quite understand the question.

Q. You testified on direct examination this morning that you made collection in one month for what fell due the previous month. [192]

Mr. Merrill: Objected to as leading.

The Court: Sustained.

Q. What is the fact as to how you collected these installments?

A. As I understood it——

Mr. Merrill: —Objected to as repetition, he testified to all this on direct examination.

The Court: Overruled, go ahead.

A. The collections that were made, were made in the month following the month in which they were due. I think that is my testimony.

Q. Is that correct?

A. That is correct. I did not say it was for delinquent installments.

Q. In other words; if you collected in July, what installment would that be for?

A. For the installment in June.

Mr. Merrill: Objected to as leading.

The Court: The answer is in. Let it stand, the objection will be overruled.

Q. Counsel asked how many you collected. Do you remember some that you collected?

A. Yes sir, I remember some.

Mr. Merrill: We object to that as immaterial.

(Testimony of William Flemming.)

Mr. Jones: We will not press it. That's all. [193]

### Recross Examination

By Mr. Merrill.

Q. When you collected a double assessment, for what months would you collect?

A. Sometimes they paid in advance and sometimes they pay for the month that they lapsed.

Q. Then they were delinquent and you knew that?

A. When they paid a double assessment or installment.

Q. When you collected an installment in July for June, you knew that it was a delinquent installment?

A. There would be two payments then.

Q. Would they always make them in two payments?      A. Yes sir.

Q. You never collected an overdue installment in one installment?      A. No.

Q. There never was a back payment, or a payment due for the month of June that you collected in July, except when you collected the July payment also?

A. No, that is not right.

Q. What do you mean when you say that it was when they made a double payment that you collected a delinquent installment?

(Testimony of William Flemming.)

A. If it was in July, I would make collection for the months of May and June.

Q. For two months delinquent? [194]

A. No, one month behind.

Q. Is it your understanding that if payment was due in June and that you collected it in July, it was on time?      A. It was.

Q. That is the basis of your testimony?

A. That is my understanding.

Q. That is the basis of your testimony?

A. Yes sir.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Jones.

Q. I show you what has been marked as exhibit I being the financial Secretary's monthly report that has been introduced in evidence. You will note this on the report "I hereby certify that this is a correct report of the members of this camp as shown by its records, made this 17th day of December 1938" I will ask you to state, if you know, when the collections would be made for that report?

Mr. Merrill: Objected to as calling for a conclusion of the witness, and it is not proper redirect examination, it is incompetent, irrelevant and immaterial for any purpose.

The Court: Overruled.

A. This is the November report and it was made in December. [195]



(Testimony of William Flemming.)

Q. When would the collection be made for that report?

Mr. Merrill: Objected to as calling for a conclusion. He testified that he made some of the collections and his Father made some.

The Court: Do you know, yourself, when these collections were made. When that was done.

A. I cannot tell that identical report.

Q. With reference to the reports that you knew about, when they were made for the month of July, that would be for what month's collections?

Mr. Merrill: Objected to as not intelligible and there is nothing identified by the question.

The Court: Sustained.

Q. If I understand you correctly,—I will ask you, when you collected an installment in July, it would be for what month?

Mr. Merrill: Objected to as repetition.

The Court: Sustained.

HARRY E. KRUSSMAN,

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones.

Q. State your name?

A. Harry Eric Krussman. [196]

Q. Are you the plaintiff in this action?

A. Yes sir.

Q. I show you plaintiff's exhibit 16 and I will ask you to state, if you know, if the signature at the bottom of the second letter of that exhibit,—if you know whose signature that is?

A. That is my signature.

Q. You know what you did with that letter after you signed it, do you?

A. Yes, I signed it on June 25, 1940 and immediately mailed it to my father in Pocatello, Idaho.

Mr. Jones: That's all.

Cross Examination

By Mr. Merrill:

Q. What date was that?

A. June 25, 1940.

Q. Where were you living during this period?

A. Twin Falls, Idaho.

Q. You came home frequently?

A. Yes, I had been.

(Testimony of Harry Eric Krussman.)

Q. I would like to have you look at exhibit 8 and I will ask you if that bears your signature?

A. On the reverse side, yes sir.

Q. Yes, to be sure. This is one sheet of paper written on both sides?

A. Yes, that is my signature. [197]

Q. Is the writing your writing?

A. The only writing is the signing and the last paragraph where it says Harry E. Krussman age 33, son, Twin Falls, Idaho.

Q. Do you know what was done with it after you signed it?

A. Handed it to Basil Flemming.

Q. For the purpose of establishing proof of loss in this case.

A. Yes, I think it was.

Mr. Merrill: That's all.

Mr. Jones: That's all, and we would like to recall Mr. Flemming for a question.

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### WILLIAM FLEMMING

Being recalled, as a witness on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

#### Direct Examination

By Mr. Jones:

Q. Mr. Flemming, you testified that you make some collections of some checks from Mr. Kruss-

(Testimony of Harry Eric Krussman.)

man, now where in the Krussman apartment or the Riverview Hotel apartment were those checks handed to you?      A. In the lobby.

Q. Who was present, if anyone?

A. Mr. Krussman.

Q. Either of his daughters there when they were handed to you? [198]      A. No sir.

Mr. Jones: That's all.

Mr. Merrill: No cross examination.

Mr. Jones: We rest.

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DR. F. M. RAY

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name?      A. Fred M. Ray.

Q. What is your profession?

A. Physician and surgeon.

Q. Where are you living?

A. Pocatello, Idaho.

Q. How long have you been engaged in the profession of physician and surgeon?

A. Since 1909.

Mr. Jones: We will admit his qualifications.

Mr. Merrill: Thank you.



(Testimony of Dr. F. M. Ray.)

Q. Did you know one Eric A. Krussman, Doctor?  
A. Yes sir.

Q. When did you first become acquainted with him, approximately?  
A. In 1911. [199]

Q. Was that acquaintance intimate?

A. We became rather close acquaintances.

Q. Were you his family physician?

A. I think I was.

Q. Did you attend him as his physician?

A. Yes sir.

Q. I am directing your attention to the month of July 1938, and will ask you, did you attend him then?  
A. Yes, I did.

Q. When were you first called?

A. According to my information, I think it was on July 22.

Q. Explain what you mean by according to your information, is that from your records?

A. In looking over my records, that is my remembrance.

Q. July 22, 1938?  
A. Yes sir.

Q. To what place did you go?

A. At the Riverview hotel.

Q. Here in Pocatello?  
A. Yes sir.

Q. What condition did you find him in?

A. Well, I found him in an unconscious state with paralysis of the right side.

Q. Did you give him an examination at that time?  
A. Yes sir.

(Testimony of Dr. F. M. Ray.)

Q. Were you able to determine the reason for his condition? [200]

A. I thought at that time that he had a cerebral hemorrhage.

Q. Did you determine that was a fact later?

A. Yes sir.

Q. Was he in the house or out doors?

A. In the living room.

Q. What did you do?

A. Put him in his bed, in the Riverview Hotel.

Q. Did you prescribe for him?

A. I don't know that I did right then.

Q. Did you call again that day?

A. That was at night. I was there several times during the next morning and next day.

Q. What was his situation the next day?

A. As I recall he was unconscious for several days.

Q. Did he have what is called a stroke?

A. Commonly called a stroke, yes.

Q. What is a cerebral hemorrhage?

A. Breaking of a blood vessel in the brain.

Q. What part of the body did it affect with Mr. Krussman?

A. The arm and leg on the right side.

Q. Any other part of the body?

A. Yes, the left side of the face.

Q. What did it do with respect to the mind?

A. He was unconscious, he wasn't responsible mentally at that time.

(Testimony of Dr. F. M. Ray.)

Q. How long did he remain in that condition?

[201]

A. Off-hand I would say perhaps two weeks.

Q. Did you call on him on July 23rd?

A. Yes sir.

Q. How many calls did you make that day?

A. I saw him several times, I judge three times a day most of the days for a week.

Q. July 24? A. Yes sir.

Q. July the 25th, how many times?

A. I judge three times a day for a week or more at that time.

Q. How long did you keep calling on him?

A. I saw him most every day if I were in town during the rest of July and August.

Q. How many times during each day of July and August?

A. I think the last part I made the least number of calls, that is, in the latter part of August.

Q. During that entire time he was suffering from the cerebral hemorrhage? A. Yes sir.

Q. A paralytic stroke? A. Yes sir.

Q. How long did he remain in bed?

A. I don't just recall how long he was. He was not able to get up at all for several weeks.

Q. Thereafter was he in a wheel chair?

A. I don't recall a wheel chair. [202]

Q. What was the result of the condition of his right side?

A. Well, after a certain length of time I think

(Testimony of Dr. F. M. Ray.)

perhaps ten or twelve days he regained a portion of his mental normalcy. I don't recall just how long it was before he got the use of his arm and leg.

Q. Isn't it a fact that his arm and leg were afflicted constantly thereafter?

A. They never got back to normal.

Q. What was the ultimate result upon his right side Doctor Ray?

A. I think aside from the fact that he couldn't make the finer movements that he was able to get around.

Q. Was his leg constantly impaired?

A. Yes sir.

Q. And his arm, was it constantly impaired?

A. Yes sir.

Q. That continued up to the date of his death?

A. Yes sir.

Q. Did he sustain a second stroke?

A. Yes sir.

Q. When?

A. I don't remember whether it was in August or September two years later.

Q. Was it on the 23rd day of July 1940?

A. It may have been in July. [203]

Q. Do you recall calling on him then?

A. Yes.

Q. What was his condition?

A. He had another stroke which perhaps didn't put him out as thoroughly as the first one, but he was pretty much unconscious from that time.



(Testimony of Dr. F. M. Ray.)

Q. Until he died? A. Yes sir.

Q. When did he die?

A. It must have been the first part of August if that stroke was in July.

Q. Was there any difference aside from severity between the two strokes?

A. I don't think he responded as much to treatment after the second stroke.

Q. What have you to say as to the same conditions of the body produced by the first and the second strokes? A. Yes sir.

Q. The same condition as existed on the first stroke was produced by the second stroke.

A. Probably the same cause.

Q. Did he regain consciousness the second time?

A. I don't recall that he was ever clear. I think there were times when he seemed to know who I was. I don't recall his having talked to me rationally after the second stroke. [204]

Q. Do you know how long it was after the second stroke to the time of his death?

A. I wouldn't know off-hand but I would say eight or ten, or twelve days.

Q. I am handing you plaintiff's exhibit for the purpose of refreshing your memory as to the date of his death.

Mr. Jones: No dispute on that. It was the second day of August.

Q. Do you recall making it out?

(Testimony of Dr. F. M. Ray.)

A. This copy.

Q. Do you recall making the original?

A. Yes sir.

Q. Is the fact as to the date of death correct?

A. August 2, I would say yes.

Q. From that as a basis, now Doctor, when did he take the second stroke?

A. If I saw him July 23, that would be ten days.

Q. What is the fact as to whether or not you saw him then?

A. I suppose I saw him every day.

Q. Did he have the second stroke in July?

A. From this certificate I would say yes.

Q. From your recollection, Doctor.

A. By refreshing my recollection I would say yes.

Q. I call your attention to the answer to question number 21, "I hereby certify that I attended deceased From August 1938, to August 2, 1940", is that correct? [205]

A. I had seen him as a patient previously.

Q. What I mean to say is this; was it in August or earlier that he took the first stroke?

A. As I recall, August.

Q. Isn't it true that you began attending him on the 22nd of July for this stroke?

A. If that is the date he took sick, it is.

Q. Have you looked at your record on this?

A. I have, but maybe I have something in my pocket to assist me.

(Testimony of Dr. F. M. Ray.)

Q. Is that instrument you are looking at, your memorandum of this matter?

A. It is on account on the books.

Q. From that can you tell when you first commenced to attend him for this stroke?

A. The first record I have is August 28th.

Q. What year?

A. 1938, which would not be right,—no I have it here, July 23.

Q. 1938.           A. Yes sir.

Q. Do you have there a paper—

A. —No, I am sorry this is 1940, I have nothing in my pocket back of August 28, 1938.

Q. You have a statement of your visits in your office, as to the visits in 1938. [206]

A. Yes sir.

Q. Can you produce it?

Mr. Jones: I think we will agree to that. We will agree that it was the 22nd or the 20th day of July.

The Court: Very well, if you agree.

Mr. Jones: We will agree that it was the 20th of July 1938.

Q. You were called immediately.

A. Yes sir.

Q. You commenced treating him the 20th of July?

A. Yes sir, if that is the time, the date of the stroke.

Q. Your visits were continued for several weeks.

A. Yes sir, all the rest of July and August and

(Testimony of Dr. F. M. Ray.)

then I seem to have seen him most every day in September.

Q. What about the time following that?

A. I saw him in October five times.

Q. In November?

A. I haven't anything in November.

Q. Was he suffering from any pre-disposing causes, any other ailment?

A. Other than that which caused his stroke.

Q. Doctor, what about his blood pressure?

A. I think he had high blood pressure.

Q. Would that be a pre-disposing cause of the stroke?      A. Could be, yes sir. [207]

Q. I hand you exhibit 7 and I will ask you if it bears your signature?

A. Yes sir, proof of death, it bears my signature.

Q. Are the questions answered in your handwriting?      A. Yes sir.

Q. I call your attention to the answer to question number 4, "when did deceased show the first symptoms of his final illness?" and the answer "August 1938". In view of the understanding that the stroke commenced July 20, 1938, is that statement correct?

A. So far as the final illness, it would be July.

Q. Instead of August?      A. Yes sir.

Q. Otherwise it is correct?      A. Yes sir.

Q. Also in question 11, "what was the remote cause of death, if from disease, give pre-disposing



cause, date of first appearance of its symptoms and history of same." The answer given "cerebral hemorrhage two years ago, August 1938." Should that be July 1938?      A. Yes sir.

Mr. Merrill: You may take the witness.

Mr. Jones: No cross examination.

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Mr. Merrill: We offer in evidence defendant's exhibit 20, a certified copy of the death certificate of Mr. Krussman, certified to by the Department of Vital [208] statistics of the State of Idaho.

Mr. Jones: Is it for the purpose of proving his death.

Mr. Merrill: For the purpose of all it contains.

Mr. Jones: No objection.

The Court: Admitted.

Mr. Merrill: Now we ask that this instrument be marked as defendant's exhibit 21.

We have a stipulation, Mr. Jones, that we will make on this matter. That defendant's exhibit "21" which we offer in evidence at this time is a check for the refund to the plaintiff Harry E. Krussman, for all assessments paid by or for Mr. Eric Krussman subsequent to his suspension of July 1, 1938, less the distribution of savings and gains paid to him. The check represents all payments made by Mr. Krussman on account of certificate T E 1321001 for the month of May 1938 less the distribution aforementioned, and of savings and gains in the sum of \$10.55 which was paid February 25, 1939 and February 1, 1940. We would like to stipulate

that the tender has been made to you on behalf of the plaintiff of said sum of money for said purpose and rejected.

Mr. Jones: We want to strike out the word suspension. We don't construe that he was suspended. I don't want to admit that it was a suspension. Strike out the word suspension. [209]

Mr. Merrill: Very well. Will you also stipulate that the tender was rejected.

Mr. Jones: Yes.

Mr. Merrill: That the tender in the form of check is satisfactory, rather than cash.

Mr. Jones: We will stipulate that we refused it and would have refused the cash.

Mr. Merrill: And that the tender of this check for \$294.80 covers and includes the amount mentioned in exhibit 13, check for \$153.25. That this check exhibit 21 was made as a tender for all installments subsequent to July,—subsequent to May 1938.

Mr. Jones: Less the distribution of savings and gains in the sum of \$10.55 each paid February 25, 1939 and February 1, 1940, and that we rejected the tender.

The Court: Admitted.

Mr. Merrill: And may it be understood that the tender is kept good in the form of the check rather than cash. Our position is that they are entitled to the return of the amount of that check.

Mr. Jones: That you made the tender and we rejected it, not if you are keeping that tender

good, it is for you to say and that is all there is to it.

Mr. Merrill: Very well, we are.

Mr. Jones: And we are still rejecting it. [210]

Mr. Merrill: I offer to amend by interlineation the answer to conform to the proof on page 3 of the answer in line three of the second paragraph by deleting the words August 24, 1939 and inserting the words "July 19, 1938."

Mr. Jones: No objection.

The Court: Amendment allowed.

Mr. Merrill: Now we rest.

Mr. Jones: No rebuttal. [211]

State of Idaho,  
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the Reporter for the United States District Court, for the District of Idaho; that I reported the testimony and proceedings in the above entitled cause in shorthand and thereafter transcribed the same into longhand and that the foregoing transcript consisting of 134 pages exclusive of this certificate is a true and correct transcript of all the testimony given and proceedings had in and about the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 23rd day of January 1942.

G. C. VAUGHAN

Reporter

[Endorsed]: Filed Feb. 9, 1942. [212]

[Title of District Court and Cause.]

MOTION AS TO EXHIBITS

Comes now the defendant and appellant, Omaha Woodmen Life Insurance Society, a corporation, and moves the Court for an Order directing the Clerk of this Court to forward to the United States Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced in this cause, in lieu of copies thereof, for use of said Appellate Court on appeal, which exhibits are more particularly described as follows:

Plaintiff's Exhibits:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, "A", "B", "C", "D", "E", "F", "F-1", "G", "H", "I", "J", "K", and 19, including Exhibits G-1 to G-49 inclusive, attached to said Exhibit 19.

Defendants Exhibits

Nos. 12, 13, 18, 20 and 21.

The foregoing being all of the exhibits in the above entitled cause.

Dated this 2nd day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant  
and Appellant,

Residing at Pocatello, Idaho.

RAINEY T. WELLS

Attorney for Defendant  
and Appellant,

Residing at Omaha, Nebraska.

[Endorsed]: Filed Feb. 9, 1942. [255]



[Title of District Court and Cause.]

### ORDER AS TO EXHIBITS

It appearing to the Court that the defendant herein, Omaha Woodmen Life Insurance Society, a corporation, has appealed to the United States Circuit Court of Appeals, Ninth Circuit, and has moved that an order issue directing that certain original exhibits be forwarded to the Appellate Court in lieu of copies thereof;

Now therefore it is hereby ordered that all of the exhibits introduced at the trial of this cause be forwarded by the clerk of this court to the Clerk of the Circuit Court of Appeals, Ninth Circuit, to be by such court held for inspection and used on the appeal so taken by said appellant; and

It is further ordered that upon the completion and use thereof by the Appellate Court that the same be returned to this court for further order by this court.

Dated this 9th day of February, 1942.

CHARLES C. CAVANAH

United States District Judge

[Endorsed]: Filed Feb. 9, 1942. [256]

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[Title of District Court and Cause.]

### MINUTES OF THE COURT OF OCTOBER 22, 1941

This cause came regularly on for trial before the Court. Messrs. Jones and Jones appeared as coun-

sel for the plaintiff and Messrs. Merrill and Merrill appeared as counsel for the defendant.

After a statement of the plaintiff's case by his counsel and a statement of the defense by the defendant's counsel, the deposition of V. J. Pakes was read and documentary evidence was introduced on the part of the plaintiff.

Further trial of the cause was continued to ten o'clock A. M. on October 23, 1941. [257]

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[Title of District Court and Cause.]

MINUTES OF THE COURT OF  
OCTOBER 23, 1941

Counsel for the respective parties being present, the trial of this cause was resumed before the Court. The reading of the deposition of V. J. Pakes was resumed and completed, and Mrs. Beatrice Ginzell, Marian Alice Krussman, William Fleming and Harry E. Krussman were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff, and here the plaintiff rests.

Dr. F. M. Ray was sworn and examined as a witness and documentary evidence was introduced on the part of the defendant, and here the defendant rests and both sides close.

The defendant was granted leave to amend the answer to conform to the proof by striking 'August 24, 1939' and inserting in lieu thereof, "July 19, 1938", and striking "July, 1939" and inserting in

lieu thereof "June, 1938", all in line three of the second paragraph on page three.

After hearing oral argument of counsel for the respective parties, the Court granted the plaintiff ten days in which to file brief and the defendant the fifteen days following. Plaintiff was granted five days in which to file answering brief. [258]

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[Title of District Court and Cause.]

#### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the Appellant, Omaha Woodmen Life Insurance Society, and hereby designates the contents of the Record, Proceedings and Evidence to be contained in the Record on Appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Order on Removal of Cause to United States District Court for the District of Idaho, Eastern Division.
3. Order Enlarging Time to Plead, dated March 31, 1941.
4. Answer.
5. Motion to Amend Answer by Interlineation.
6. Minute Entry Allowing Amendment.
7. Written Opinion of the Court, dated December 5, 1941.

8. Findings of Fact and Conclusions of Law.

9. Judgment.

10. Objections to Findings, Conclusions of Law and Judgment, and Motion to Strike, Amend and Substitute, together with Ruling of the Court thereon.

11. Notice of Appeal.

12. Cost Bond on Appeal. [259]

13. Petition for Approval of Supersedeas and Stay on Appeal.

14. Order Approving Bond and Granting Stay of Execution.

15. Supersedeas Bond.

16. All testimony taken at the trial, the same being contained in the Reporter's Transcript, two copies of which are herewith filed with the Clerk of this Court.

17. The exhibits to be printed in the record, to-wit:

Plaintiff's Exhibits numbered 1, 2, those portions of Plaintiff's Exhibit numbered 3, designated as:

Section 63 (a) and (b) on Page 55,

Section 65 on Pages 55 and 56,

Sections 66 (a) and (b) on Page 56,

Sections 82 (a) and (b) on Page 61,

Section 105 (a) and (b) on Pages 70 and 71.

Section 109 (g) on Page 73,

Section 111 on Page 73.



Also those portions of Plaintiff's Exhibit numbered 4, designated as:

Section 63 (a) and (b) on Page 55,  
Section 65 on Pages 55 and 56,  
Sections 66 (a) and (b) on Page 56,  
Sections 82 (a) and (b) on Page 64,  
Section 109 (g) on Page 75.

Also those portions of Plaintiff's Exhibit numbered 5, designated as:

Section 63 (a) and (b) on Page 56,  
Section 65 on Pages 56 and 57,  
Section 66 (a) and (b) on Page 57,  
Section 72 (a) and (b) on Pages 58 and 59,  
Section 82 (a) and (b) on Pages 65 and 66,  
Section 107 (a) on Page 76,  
Sections 107 (g) and (h) on Page 77,

Also Plaintiff's Exhibits numbered 6, 7, 8, 9, 14, 15, 16, 17, "A", "B", "C", "E", "F-1", "J", "K".

Also Plaintiff's Exhibit numbered 19, being a Stipulation, except the Exhibits numbered "G-1" to "G-49" attached thereto, which are to be forwarded in original form to the Appellate Court.

Also Defendant's Exhibits numbered 10, 11 and 18.

18. Motion as to Exhibits.
19. Order as to Exhibits.
20. All Court Minutes.

21. Two Copies of Reporter's Transcript.
22. Designation of Contents of Record on Appeal and Proof of Service.
23. Statement of Points and Proof of Service.

Dated this second day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant  
and Appellant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant  
and Appellant

Residing at Omaha, Nebraska

[260]

Service of the foregoing Designation of Contents of Record on Appeal by receipt of copy thereof admitted to have been made this 2nd day of February, 1942.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff  
and Appellee

Residing at Pocatello, Idaho

[Endorsed]: Filed Feb. 9, 1942. [261]

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[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the Defendant-Appellant, Omaha Woodmen Life Insurance Society, and makes the

following Statement of the Points upon which it intends to rely in the appeal taken to the Circuit Court of Appeals of the Ninth District in the above entitled cause:

### I.

That the Omaha Woodmen Life Insurance Society is a fraternal benefit society and insures the lives of some of its members as part of its fraternal functions. That the contract between Eric A. Krussman, deceased, and the Omaha Woodmen Life Insurance Society consists of the Member's Application, the Certificate Issued, the Articles of Incorporation and all of the provisions of the Constitution, Laws and By-Laws of the Association, and all amendments thereto. The provisions of said contract are binding upon his beneficiaries and the Society and the member is conclusively presumed to know the terms of the entire contract and the nature and effect of each of the provisions contained therein.

### II.

The contract in the case at bar contained provisions to the effect that the member must pay his dues monthly for the [262] month in which they became payable and if he failed to do so the contract was automatically terminated and he was suspended; that thereafter, and within three months from the date of suspension he could pay the delinquent assessments and again become a member, provided he was in good health and remained in good health for thirty days. The Society was re-

quired to accept the payment of delinquent assessments within said period of time but the same came with a warranty on the part of the member that he was in good health, which warranty, if false, rendered ineffective the attempt of the member to again become reinstated and left the certificate of insurance void. Eric A. Krussman, the member in the Certificate sued on in the case at bar, failed to make his monthly payments within the month for which they became due from June, 1938, until his death, and during all of said time he was not in good health and consequently he never thereafter became reinstated as a member, nor his Certificate rendered effective, but upon his death on August 2, 1940, the Certificate was void and of no force or effect and his beneficiaries were not entitled to recover thereunder.

### III.

That under the evidence introduced in this case, the Beneficiary Certificate upon which suit was instituted was void because the member had not conformed to the terms of the contract in the payment of his installments; that the Certificate became void and was never reinstated after commencement of Mr. Krussman's illness, and the trial Court erred in rendering Judgment against the defendant.

### IV.

That there was no waiver on the part of the Omaha Woodmen Life Insurance Society of any of the provisions of the Contract and particularly the



requirement of timely payments and the warranty of good health, and the trial Court erred in finding and concluding that the provisions making such requirements had been waived. [263]

#### V.

That the evidence introduced is wholly insufficient to prove a waiver by the defendant of any of the terms of the contract of insurance.

#### VI.

That neither the financial secretary or his agent had any power to waive any of the provisions of the contract including the provisions of the Constitution, Laws and By-Laws of the Society and any knowledge which he, or his agent may have had, if any, as to the ill health of Eric A. Krussman when collection was made of any delinquent payment, or at any other time, was immaterial so far as the issues of this case are concerned and was not and could not have constituted evidence that the said financial secretary had communicated such information to the defendant, and the defendant was not charged with any such information.

#### VII.

Eric A. Krussman was not in good health from on or about July 22, 1938, until he died on August 2, 1940, and the warranty of good health accompanying the payments tendered after July 22, 1938 was false and the falsity thereof was unknown to the defendant; that the receipt of such payments

by the appellant and the delivery to the member of refund of \$10.55 per year, and the form letters sent by Mr. Bradshaw were all without knowledge on the part of Mr. Bradshaw or any officer of the Society, that Mr. Krussman was not in good health, and consequently that which was done by Mr. Bradshaw or the appellant in such respects could not effect its legal rights, nor constitute a waiver or in anywise change the terms of the contract.

### VIII.

The member holding a Certificate of Insurance is conclusively charged as a matter of law with knowledge of the [264] provisions of his Contract and that if he does not pay the assessments as agreed his Certificate becomes void and any payment thereafter made is for the reinstatement pursuant to the terms of the contract and not otherwise.

### IX.

Generally, the contract sued upon in this case was forfeited for violation of its terms by Eric A. Krussman, and never thereafter became reinstated, and was void on the date of the death of the said Eric A. Krussman; that there was no waiver of any contractual provision by defendant, and the defendant, under the evidence introduced herein, was not liable under said contract to the plaintiff on any theory. The trial Court should not have made and entered Findings of Fact and Conclusions of Law and Judgment contrary to the defendant,

but should have sustained the Objections to the Findings, the Motion to Strike and should have made substitute Findings and Conclusions as requested by the defendant and entered judgment in favor of defendant.

Dated this 2nd day of February, 1942.

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant  
and Appellant

Residing at Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant  
and Appellant

Residing at Omaha, Nebraska

Service of the foregoing statement of Points on Appeal by receipt of copies thereof admitted to have been made this 2nd day of February, 1942.

T. D. JONES

RALPH H. JONES

[Endorsed]: Filed Feb. 9, 1942. [265]

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[Title of District Court and Cause.]

### STIPULATION RE EXHIBITS

It is stipulated by and between the above parties, through their attorneys of record that in order to avoid printing parts of exhibits deemed unnecessary and difficult to print the appellant's Designation of



the Contents of Record, wherein certain exhibits are required to be printed, may be modified as follows, to-wit:

That only that portion of Plaintiff's Exhibit 1 need be printed, as follows:

[Printer's note]: Set forth at pages 104, 105 of this printed transcript of record. [266]

That only that portion of Plaintiff's Exhibit 7 need be printed, as follows:

[Printer's Note]: Set forth at pages 130, 131 of this printed transcript of record.

That only that portion of Plaintiff's Exhibit 8 need be printed, as follows: [267]

[Printer's Note]: Set forth at pages 131, 132 of this printed transcript of record.

That only that portion of Plaintiff's Exhibit 9 need be printed, as follows:

[Printer's Note]: Set forth at page 132 of this printed transcript of record.

It is further stipulated that it is impractical to print Defendant's Exhibit 18.

It is further stipulated that the remaining portions of the above numbered Exhibits and also Plaintiff's Exhibits Numbered 3, 4 and 5 not otherwise required to be printed and Plaintiff's Exhibits numbered 12, 13, "D", "F", "G", "H", "I" and Exhibits G-1 to G-49 inclusive attached to Plaintiff's Exhibit Number 19, and Defendant's Exhibits numbered 18, 20 and 21, are deemed to be impractical and unnecessary to print in the record, but would [268] best serve the Appellate Court by being



transmitted in original form and that said parties pray for an Order dispensing with the printing of same.

Dated this 26th day of February, 1942.

T. D. JONES

RALPH H. JONES

Attorneys for Plaintiff

Residence and P. O. Address

Pocatello, Idaho

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendant.

Residence and P. O. Address

Pocatello, Idaho

RAINEY T. WELLS

Attorney for Defendant

Residence and P. O. Address

Omaha, Nebraska

[Endorsed]: Filed Feb. 28, 1942. [269]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT TO TRAN-  
SCRIPT OF RECORD

United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages

numbered 1 to 269, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$33.50, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 2nd day of March, 1942.

[Seal]

W. D. McREYNOLDS,  
Clerk.

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[Endorsed]: No. 10077. United States Circuit Court of Appeals for the Ninth Circuit. Omaha Woodmen Life Insurance Society, a corporation, Appellant, vs. Harry E. Krussman, as trustee of an express trust, Appellee. Transcript of Record.

Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed March 5, 1942.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10077

OMAHA WOODMEN LIFE INSURANCE  
SOCIETY, a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, Trustee of an Express  
Trust,

Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL AND DESIGNATION OF RECORD  
NECESSARY FOR CONSIDERATION  
THEREOF

Comes now the appellant and hereby adopts as its Statement of Points upon which it intends to rely on appeal, the Statement of Points heretofore filed with the Clerk of the District Court of the United States District of Idaho, from which Court

this appeal is taken, such Statement of Points being that appearing in the Transcript certified to this Court by said Clerk of the United States District Court for the District of Idaho.

The appellant hereby designates for printing, as the parts of record necessary for the consideration of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits and excerpts from exhibits which are enumerated in Paragraph numbered 17 of the Designation of Contents of Record on Appeal, and as modified by Stipulation between the parties dated the 26th day of February, 1942, and filed with the Clerk of the United States District Court for the District of Idaho; expressly specifying however, that the exhibits and remaining parts of exhibits not therein requested to be printed be not printed but appellant prays that the same be considered by this Court in their original form.

A. L. MERRILL

R. D. MERRILL

Residence and Postoffice

Address: Pocatello, Idaho

RAINEY T. WELLS

Residence and Postoffice

Address: Omaha, Nebraska

Attorneys for Appellant



Service of the foregoing Statement admitted to have been made this 12th day of March, 1942.

T. D. JONES

RALPH H. JONES

Residence and Postoffice

Address: Pocatello, Idaho

Attorneys for Appellee

[Endorsed]: Filed Mar. 14, 1942.

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[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING  
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States  
Circuit Court of Appeals, Ninth Circuit:

The Petition of the Omaha Woodmen Life Insurance Society, a corporation, respectfully shows:

That an Appeal has been perfected by your petitioner to this Court from a Judgment rendered in the United States District Court for the District of Idaho in a suit wherein Harry E. Krussman, Trustee of an Express Trust, was plaintiff, and Omaha Woodmen Life Insurance Society, a corporation, was defendant.

There was introduced in evidence at the trial of the cause by the respective parties the following exhibits, to-wit:

Plaintiff's Exhibits numbered 1 to 9 inclusive,  
Plaintiff's Exhibits numbered 12 to 17 inclusive;

Plaintiff's Exhibit No. 19; Plaintiff's Exhibits "A", "B", "C", "D", "E", "F", "F-1", "G", "H", "I", "J", and "K"; also Defendant's Exhibits numbered 10, 11, 18, 20 and 21. That Plaintiff's Exhibits numbered 2, 6, 14, 15, 16, 17, "A", "B", "C", "E", "F-1", "J", "K", and Defendant's Exhibits numbered 10 and 11 will be printed in full in the record and pertinent excerpts will be printed from Plaintiff's Exhibits numbered 1, 3, 4, 5, 7, 8, and 9 and all of Plaintiff's Exhibit 19 might be printed except those exhibits attached thereto and marked Exhibits "G-1" to "G-49" inclusive, being cancelled checks.

That the exhibits which appellant believes would be impractical and difficult to print and for which no application to print has been made are Plaintiff's Exhibits 12 and 13, "D", "F", "G", "H", and Plaintiff's Exhibits "G-1" to "G-49", being bank checks, and Defendant's Exhibit 18, being a record card, and Defendant's Exhibit 20, being a photostatic copy of a Death Certificate, and Defendant's Exhibit No. 21, being a bank check. That Plaintiff's Exhibit No. 1 is an Application for Membership in the defendant society, Plaintiff's Exhibits numbered 3, 4 and 5 are pamphlets containing the Constitution, Laws and By-Laws of the Appellant and Plaintiff's Exhibits numbered 7, 8 and 9 are proofs of death of Eric A. Krussman, and it is thought that only pertinent parts of said exhibits heretofore designated should be printed, but that all of the remaining parts of said exhibits

and those not printed should be available for consideration by this Court in the original form.

All of the said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the Ninth Circuit Court of Appeals. There is attached hereto an affidavit of A. L. Merrill which is made part hereof.

Wherefore your petitioner prays for an Order dispensing with the printing of Plaintiff's Exhibits numbered 12 and 13, "D", "F", "G", "H", and "G-1" to "G-49", and Defendant's Exhibits numbered 18, 20 and 21, and those parts of Plaintiff's Exhibits numbered 1, 3, 4, 5, 7, 8, and 9 not heretofore requested to be printed and that all of the said original exhibits be considered by this Court.

OMAHA WOODMEN LIFE

INSURANCE SOCIETY

By A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address:  
Pocatello, Idaho

RAINEY T. WELLS

Residence and Post Office Address:  
Omaha, Nebraska

Attorneys for Appellant

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Mar. 14, 1942.



[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF A. L. MERRILL

State of Idaho,  
County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the Omaha Woodmen Life Insurance Society, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an Order dispensing with the printing of certain exhibits and parts of certain other exhibits, all as stated in the Application for Order attached hereto.

That Judgment was rendered herein in favor of the plaintiff against the defendant on December 23, 1941; that on January 31, 1942 defendant perfected an Appeal to this Court by filing its Notice and Undertaking on Appeal and has since served and filed the additional papers required by the rules of this Court:

That on February 9, 1942, the Honorable Charles C. Cavanah, District Judge, made an order directing that all of the original exhibits be forwarded to this Court with the Record on Appeal.

That on February 26, 1942, the parties through their counsel of record stipulated that it was impractical and unnecessary to print certain exhibits referred to in the accompanying Application and that only excerpts from other exhibits referred to therein be printed, thus leaving for printing such



exhibits as did not offer difficulty in printing; that the exhibits which it is requested be not printed present difficulties in printing and would decidedly encumber the record as would more particularly appear from an examination of said exhibits and that such exhibits may probably serve the Appellate Court better in their original form.

A. L. MERRILL

Subscribed and sworn to before me this 12th day of March, 1942.

(Seal)

G. L. STOWELL,

Notary Public

Residing at Pocatello, Idaho

My Commission expires 3-21-43.